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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT, & WM. RAWLE, JUN.

VOL. XVII.

PHILADELPHIA:

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Clerk of the Eastern District of Pennsylvania.

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

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MOLTON C. ROGERS, Esq.

CHARLES HUSTON, Esq.

JOHN TOD, Esq.

FREDERICK SMITH, Esq., (appointed the 31st of January, 1828, in the place of THOMAS DUNCAN, Esq., deceased.)

} Justices.

ATTORNEY GENERAL;

AMOS ELLMAKER, Esq., (appointed May, 1828.)

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

SOUTHERN DISTRICT—OCTOBER TERM, 1827.

[CHAMBERSBURG, OCTOBER 17, 1827.]

EBY *against* BURKHOLDER.

IN ERROR.

An action does not lie upon the sentence of the Court of Quarter Sessions on a conviction of fornication and bastardy, ordering a weekly allowance for the maintenance of the bastard child: the only means of enforcing the sentence is by a commitment in execution.

ON a writ of error to the Court of Common Pleas of *Franklin* county, the case appeared to be an action of debt brought by *Matty Burkholder*, the plaintiff below and defendant in error, against *Benjamin Eby*, the plaintiff in error and defendant below, in which a verdict and judgment were rendered in favour of the plaintiff below for one hundred and thirty-seven dollars and twenty-seven cents.

At *April* sessions, 1820, the defendant, *Benjamin Eby*, was indicted and convicted in the Court of Quarter Sessions of *Franklin* county, for fornication and begetting a bastard child on the body of the plaintiff, *Matty Burkholder*, and the court passed the following sentence:—

“Whereupon the court do adjudge the defendant to pay a fine to the commonwealth of one dollar, to pay twenty dollars to *Matty Burkholder* for lying-in expenses, to pay nine dollars, which will be one dollar per week until to-morrow, from the birth of the child; from that time to pay at the rate of one dollar per week until the child arrives at seven years of age; to be bound himself

(Eby v. Burkholder.)

in one thousand dollars and one good security in one thousand dollars to indemnify the county; money to be paid quarterly—pay the costs of prosecution, and stand committed until the sentence be complied with.”

The defendant excepted to the opinion of the court, admitting in evidence the record of this conviction and sentence: and, also, requested the court to charge the jury,—

1. That the present action of debt, having been brought on a sentence and judgment of the Court of General Quarter Sessions of the peace of *Franklin* county, on an indictment against *Benjamin Eby* for fornication and bastardy with *Matty Burkholder*, the plaintiff, cannot be supported.

2. That the said indictment, and the trial, sentence, judgment and all other the proceedings thereon, being in the name of the commonwealth, this action cannot be sustained.

3. That the sentence and judgment of the court is that *Benjamin Eby* pay so much for the support of a bastard child, and not generally so much to *Matty Burkholder*, and therefore the present action does not lie.

4. That the sentences and judgments of the Court of Quarter Sessions are enforced by imprisonment of the defendant until complied with; or by his entering into recognizances conditioned for their performance, which may be sued, and that no other modes of enforcing obedience are known to the law; and that, consequently, this action cannot be supported.

On the above points the court charged the jury as follows—that it is the opinion of the majority of the court that on the proceedings of the Court of Quarter Sessions, sentence, &c., as above, this action can legally be sustained.

Crawford, for the plaintiff in error.—The mode of enforcing obedience is by imprisonment. In criminal cases the court are bound to pursue the mode pointed out by the act of assembly. By the act of 1705, the security is not to be given to the mother. *Com. Dig.* 250, says not paying is a *contempt*. She had no vested interest. The overseers were to pay the person who should take care of the child. The defendant, in a case of this kind, may be discharged as an insolvent only by a special act which shows the sentence does not create a debt. He cited 2 *Dall.* 123, that to maintain an action it must be a civil judgment between the parties.

Dunlop, contra, cited 1 *Chitt.* 102. 3 *Com. Dig.* 363. *Debt, A. 2. Bull. N. P.* 163.

The opinion of the court was delivered by

GIBSON, C. J.—All the exceptions are resolvable into one—that debt does not lie on the sentence of the Court of Quarter Sessions. It is said this action lies for money due only on a contract express or implied. It clearly lies on a judgment in an action, because such a judgment binds the right and establishes the claim of the

(Eby v. Burkholder.)

party to the thing recovered; from which, it may be said, the law implies a contract to pay. But whether debt lies on a decree in equity, which acts not on the right but the person of the suitor, may still be thought doubtful in those states where there is a Court of Chancery; as it would in general seem to be the regular course to carry a foreign decree into execution by a chancellor, who would, if it were needful, inquire into the demand on original grounds. In this state, however, an action must be sustained to prevent the failure of justice. In *Evans v. Tatem*, (9 *Serg. & Rawle*, 252,) we refused to enter into the merits; but I confess it weighed much with me, that the decree so far partook of the nature of a judgment, that in the state where it was pronounced, it might have been enforced by an execution. But the sentence of a Court of Quarter Sessions is quite another thing. In establishing the right of the party to the thing recovered, a judgment in an action operates as an estoppel, and, consequently, only between the parties. What was the judgment here? The court sentenced the defendant to pay a fine of one dollar to the commonwealth, and made an order that he should pay the mother twenty dollars for lying-in expenses, and a dollar a week for the maintenance of the child from its birth until it should be seven years old, and give security in one thousand dollars to indemnify the county. The 8th section of the act of 1705, directs, "That every person being legally convicted to be the reputed father of a bastard child, shall give security to the court, town or place where such child was born, to perform such order for the maintenance of such child as the justices of the peace in their sessions shall direct or appoint." This is the only act which authorizes an order for the maintenance of the bastard; and it will be perceived that the mother is not necessarily to be a party. Here the court thought proper to appoint her as the hand to receive; but any one else might just as well have been put in her place. But the order was not merely to pay a sum presently due, but also a weekly allowance as it should be earned thereafter; for the mother would undoubtedly be entitled only for the time during which she actually maintained the child; consequently, in addition to the order, evidence of actual maintenance would be necessary to make out her case. But in an action on a judgment the record is always sufficient in the first instance; and, beside, a judgment can be the subject of only one action, whereas to do complete justice in a case like the present, would require a separate remedy for the maintenance of each week as the price of it should be earned. In a conviction of larceny, where restoration of the thing stolen is a part of the sentence, the legislature has thought proper to provide a particular remedy for the owner by execution against the convict's property; which would seem to indicate that such a remedy was deemed necessary to prevent the failure of justice. In the absence of an analogous provision, I am of opinion that the plaintiff had no other means of en-

(Eby v. Burkholder.)

forcing the order than the common law means of enforcing every sentence—a commitment in execution.

HUSTON, J., dissented.

Judgment reversed.

[CHAMBERSBURG, OCTOBER 19, 1827.]

WOODS *against* WOODS.

APPEAL.

An issue directed to and entered in the Court of Common Pleas by the Orphans' Court, may be removed to the Circuit Court for trial.

APPEAL from the opinion of GIBSON, C. J., at a Circuit Court for *Cumberland* county, held in *April* last.

On the 13th of *May*, 1825, the administration account of *Nathan Woods*, one of the executors of *Richard Woods*, deceased, being presented for confirmation to the Orphans' Court of *Cumberland* county, item numbered 36 on the credit side of the account, in which he claimed to retain eight hundred and eighty-one dollars and ninety-two cents was objected to by *William Woods*, jr., *James S. Woods*, *Samuel Woods*, sen., *Jane Woods*, jr., and *Richard Woods*; whereupon, at the suggestion of the court, it was agreed that an issue be directed to the Court of Common Pleas, in which the said *William Woods*, jr., and others above-mentioned, be plaintiffs, and *Nathan Woods* defendant, as of *April* term, 1825, in which the plaintiffs are to declare for money had and received and the defendant to plead payment; upon which issue the right of the defendant to retain the said sum of money, or any part thereof, or not to retain the same, or any part thereof, is to be tried without regard to the particular form of the issue. Done in open court by consent.

The issue thus directed was accordingly entered in the Court of Common Pleas of *April* term, 1825, and was removed by the defendant, by *certiorari*, to the Circuit Court for *Cumberland* county.

Penrose, for the plaintiffs, moved that court to quash the *certiorari*, which was refused, and an appeal was now taken from this decision to the court in bank.

Penrose and *Metzgar*, for the appellant.—In *Ingersoll v. Bradford*, 4 *Yeates*, 175, no objection was made to the appeal, and no authority is to be derived from a single case which has passed *sub silentio*. An issue is not an action. The court directing it has a right to name the *forum*, and to leave the decision of the fact to the tribunal in which it may have most confidence; especially as the proceeding is for its own information. The issue

(Woods v. Woods.)

is not the cause of the forum *to* which it has been sent, but of the forum *from* which it has been sent.

Carothers and *Ramsay*, for the appellee, cited *Ingersoll v. Bradford*, 4 *Yeates*, 175. *Sterret v. Douglass*, 2 *Yeates*, 46, and *Hiester v. Lynch*, 1 *Yeates*, 108.

PER CURIAM.—The argument for the appellant would have weight, if an issue directed by the Orphans' Court were like an issue sent from chancery, which continues to be under the control of the chancellor throughout, the judges to whom it is sent being merely commissioners to try the fact and certify the verdict without rendering their judgment: so that it is the province of the chancellor alone to judge of the regularity of the trial, and of the propriety of again sending the question to a jury. With us, however, a feigned issue is to every legal intent an action; the motion for a new trial being entertained by the court in which the question has been tried, and the practice being to render a judgment on the verdict for the purpose of enabling the unsuccessful party to have the proceedings reversed on a writ of error. The Orphans' Court therefore is not to be governed exclusively by the opinion of the court to which the issue is sent, nor does it exercise any power of selection, as it can send an issue to no other court than the Court of Common Pleas. But as there is neither reason nor authority for restricting the trial of an issue to that court, it may be removed subject to the limitations which are applicable to other actions. We do not admit that a motion like the present is a proper subject for an appeal to this court; but as a decision of the principal question may be useful in practice, we have availed ourselves of the occasion to express our opinion on it.

Appeal dismissed.

[[CHAMBERSBURG, OCTOBER 31, 1827.]

DOBBINS *against* STEVENS.

APPEAL.

A counsel who has been consulted concerning the title of land about to be sold under an execution, and stated correctly that it was subject to liens, by which purchasers were deterred from bidding, is not thereby precluded from becoming a purchaser himself.

APPEAL by the defendant from the opinion of *HUSTON, J.*, holding a Circuit Court for *Adams* county, in pursuance of which a verdict was rendered in favour of the plaintiff.

The suit was an ejectment brought by *James Dobbins* against *Thaddeus Stevens*, for 200 acres of land in *Adams* county, of which *Thomas Cross* was seized in his demesne as of fee, and by

(Dobbins v. Stevens.)

his last will and testament devised the same to the plaintiff. "*James Dobbins*, Esq. his heirs and assigns for ever, provided he charges himself with the sum of two thousand pounds, the price at which I value the same, which said sum, together with the proceeds of my personal estate, I bequeath in manner following." The testator then bequeathed to his wife *Elizabeth*, three hundred and forty pounds, to be paid her in six months after his decease, and directed his executors to apply the sum of one hundred pounds for her support, which sums were in lieu of dower at common law. To his grandson, *John Cross*, he bequeathed one thousand pounds, to his grandchildren, the sons and daughters of his daughter, *Martha M'Murray*, (of whom it appeared in evidence there were eight,) twenty pounds a piece: to *James Dobbins*, sixty pounds: to *Martha Vanest*, two hundred pounds: and all the rest and residue of his estate he directed to be distributed by his executors among such of his grandchildren as needed and deserved it most: and he made *James Dobbins* and another executors.

In the inventory of *Cross's* estate, *Dobbins* charged himself with two thousand pounds agreeably to the will. A judgment was obtained *April*, 1822, against *Dobbins*, by the Bank of *Gettysburg* for three thousand one hundred and eleven dollars, on which execution issued, and the land was sold by the sheriff to the defendant, *Stevens*, for six hundred and thirty dollars, who paid the money to the sheriff, received a deed acknowledged, (though the acknowledgment was objected to,) and took possession.

It appeared in evidence, that a considerable portion of the legacies had been paid, but that some remained due and unpaid: and a report prevailing prior to the sheriff's sale, that there were liens on the land on account of these unpaid legacies, *Stevens*, who was a gentleman of the bar, was applied to for his opinion by a person who intended to bid one thousand nine hundred and fifty dollars, if he could obtain a clear title. He stated his opinion to be that there were liens on the land, and the person declined attending the sale. On other occasions before and at the time of the sale he gave the same opinion. *Stevens* afterwards, under an arrangement with other persons, bid for and purchased the property at the sheriff's sale on joint account, with an understanding that the legacies were to be a lien on the land.

His Honour charged the jury that the conduct of *Stevens* in giving an opinion, by which persons intending to purchase were deterred, and the property was depreciated, was a legal fraud, and invalidated the purchase, and that the plaintiff was entitled to recover: and a verdict was rendered in favour of the plaintiff.

Stevens, for the appellant.—The charge put actual fraud out of the question. It was also laid down that being the attorney did not disqualify. But it was put on the ground of the attorney having been consulted, even though the advice he gives be correct. This is not the case of a trustee—the sale was not the attorney's sale.

(Dobbins v. Stevens.)

The same objection would lie to a man, not an attorney, who should give advice as to the title. He cited 2 *Dall.* 131. 6 *Binn.* 395.

Dobbins, contra, cited 11 *Mod.* 208. 10 *Wheat.* 226. The legacies were not a charge on the land. The executor was only to charge himself with the value of the land in the inventory. The whole will shows a personal trust in the executor. The estate was composed of real and personal blended in the hands of the executor, in which no particular legatee was to have the benefit of the land as a security.

The attorney, therefore, gave advice calculated to prevent bidders, who would have had a clear title. The policy of the law strongly forbids his becoming a purchaser.

The opinion of the court, (HUSTON, J., taking no part,) was delivered by

GIBSON, C. J.—Actual fraud cannot be pretended, for I think it clear the advice given, was perfectly correct. A chancellor would raise the legacies out of the land in the hands of Mr. *Dobbins* or any one claiming under him. He was not an object of the testator's bounty, but a purchaser for value, and we are not to suppose the testator intended to part with the land as a security. Mr. *Stevens* was therefore altogether accurate in advising that the legacies were a charge on the land. The question then is, whether a counsel who has been consulted about a title which is going to be sold on an execution, is to be excluded from becoming a purchaser. I cannot discern the policy of the rule which should disqualify him. A trustee may not purchase at his own sale, because, being both buyer and seller, he would have it in his power to purchase at his own price; and as his motives could rarely be penetrated, the facility with which he might accomplish a fraudulent purpose, at but little risk of detection, would offer a temptation which ought not to be cast in the way of any one. In such a case as the present, there can be no such temptation. If the counsel were to advise erroneously, it would be easy to show it; and any other sort of management or trick might be made apparent as readily when practised by a counsel as by any one else. If no one has been injured by advice which it was proper for the counsel to give, and for the client to receive, who shall complain? I will not say that a counsel, or any one else who has purchased at an under price in consequence of erroneous advice to those who would otherwise have bid, ought to retain an advantage thus obtained. Such a loss ought not perhaps to be borne by an innocent party in favour of him whose act occasioned it. But here was neither loss nor injury. If Mr. *Stevens* had refused his opinion, other counsel might have been consulted, who, it is fair to presume, would have advised accurately, and consequently in the way that he did: but although it be possible that they might have arrived at a different conclusion, yet the interest which Mr. *Dobbins* may be supposed to have

(Dobbins v. Stevens.)

had in the chance of their doing so, is one that cannot be recognised here. Doubts of the title once excited, they would not have bid without having those doubts removed; and we ought not to declare the sale void for professional advice given by the purchaser, correctly, in good faith, and without injury to any one. The cause therefore is to be sent to another jury; but as Mr. *Stevens* purchased with an understanding that the legacies were to remain charged, instead of being paid out of the purchase money, the new trial is awarded on terms that he stipulate on the record to satisfy the legacies out of the land, if the plaintiff shall not recover.

Judgment of the Circuit Court reversed, and a new trial awarded.

[CHAMBERSBURG, OCTOBER 31, 1827.]

CAUFFMAN *against* CAUFFMAN.

IN ERROR.

Testator bequeathed to the widow twelve hundred dollars and various specific legacies, and devised the real estate where he lived to his son, *Isaac*, with remainder to his daughters, and a house and lots in *Carlisle* to his son, *John*, he paying three thousand dollars to his daughters, and died in *August*, 1823. The widow accepted some of the specific legacies, but on the 10th of *November*, 1823, filed in the Register's Office a written refusal to take under the will. She afterwards received the twelve hundred dollars from the executors in full of the sum bequeathed; and by a written instrument reciting an agreement between her and the principal devisees and legatees that *Isaac* pay her in addition four hundred dollars, she, in consideration thereof, released all right of dower, excepting and reserving all privileges, legacies, and rights under the will, and all right of dower to the real estate situate in *Carlisle*, it being expressly understood she refused to take under the will, and elected to take under the intestate laws, and that the release was a compromise with *Isaac* and the executors, and the reference to the will was only to designate the privileges, &c. Held, that the widow was not entitled to dower out of the real estate situate in *Carlisle*.

WRIT of error to the Court of Common Pleas of *Cumberland* county, in an action of dower brought by *Elizabeth Cauffman*, the defendant in error and plaintiff below, against *John Cauffman*, to recover her dower in a house and lot situate in the borough of *Carlisle*, of which her late husband, *Christian Cauffman*, died seised. The property rented for about two hundred and fifty dollars per annum.

The plaintiff produced in evidence the will of *Christian Cauffman*, dated the 15th of *March*, 1823, and proved the 4th of *September*, 1823. The testator died in the latter part of *August* of that year. By the will he devised and bequeathed as follows:—

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"I give and devise unto my dear wife *Elizabeth* one thousand two hundred dollars in money, to be paid to her within one year from and after my decease, my riding mare, a new saddle and bridle, one bed and bedding, the case of drawers and table, made by Mr. *Snively*, one cow and two sheep, and during her natural life the entire use of the parlour on the lower floor of my dwelling-house and the room up stairs that has the fire-place in it, the privilege of occupying as much of the kitchen, spring-house, and cellar; as is necessary for her own accommodation, the use of one of my ten-plate stoves, and the one-sixth part of the garden, and sufficient fire-wood. It is further my will that my son *Isaac*, his heirs and assigns furnish my said wife each and every year during her lifetime with twelve bushels of wheat, one fat hog of about eighty or eighty-five pounds weight, and fifty or sixty pounds of beef, and haul home her fire-wood, together with sufficient pasture in the summer and fodder in the winter for her mare, cow, and sheep. I give and devise unto my son *Isaac* all my real estate whereon I now live; all the grain in growth thereon now, or that may be in growth at the time of my decease, my young bay horse, one bed and bedding, the ten-plate stove in the dining-room, my clock, and the stove allowed for my wife, after her death; and in case my son *Isaac* should die without lawful issue, it is my will that the real estate, herein bequeathed to him, shall be divided equally between my daughters *Elizabeth* and *Barbara*, (or, in case of their death, then their children,) and my son *John's* children; that is, my son *John's* children to draw an equal share with one of my daughters. I give and devise unto my grandson, *John Cauffman*, my house and lot of ground in the borough of *Carlisle*, and my lots adjoining the said borough, in consideration of which I do hereby order and direct him to pay his two brothers and sisters three thousand dollars within three years from and after my decease. And it is also my will that my executors make sale of all my personal property, not bequeathed, as soon as practicable after my death, and whatever remains after paying all just demands against my estate and the legacies within named, they divide in equal shares between my son *Isaac*, my daughters *Elizabeth Rupp*, and *Barbary Eberly*; and, lastly, I do nominate, constitute, and appoint *George Rupp*, sen. and *Benjamin Eberly* executors of this my last will, declaring this and no other to be my last will and testament. In testimony whereof, &c."

The plaintiff also read in evidence a paper termed the election of demandant, filed in the Register's Office on the 10th of *November*, 1823.

"To *Frederick Sharetts*, Esq., register of *Cumberland* county.

"SIR,

"Whereas my husband, *Christian Cauffman*, late of *East Pennsborough* township, did make his last will and testament,

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and did not make ample provision for me as he ought, in my opinion, according to the estate he possessed at his death; I have refused, and do refuse, to take under the will of the testator, my late husband; and elect to take according to the intestate laws of this commonwealth, in such case made and provided for widows refusing to take under the wills of their deceased husbands; and I request the register to make a record of this my election.

Carlisle, 10th November, 1823.

Attest,
William Ramsey,
Andrew Carothers..

Her
Elizabeth X. Cauffman,
mark."

The defendant gave in evidence as follows:—

John Weise.—I was one of the appraisers of the personal property of *Christian Cauffman*, deceased, on the 6th of *September*, 1823. The widow was present, and said she thought it was hard that we should appraise her saddle and bridle which *Mr. Cauffman* had given to her by his will. She mentioned the marks of the cow, and said it was her cow; we made a separate list of all the articles willed to her.

George Rupp, sen.—The will was read the day of the appraisement; she said nothing against it; she told us what cow she intended to take; she had her choice of the sheep—likewise she showed what table, drawers, and bedding she took under the will; she got every thing the will allowed her; she continued in the house, and is there yet.

Isaac Cauffman.—This will was read on the day of *Christian Cauffman's* funeral. The widow said she would not live up to it; she thought she would take the third of the place; she took the things willed to her; they were shown by her to the appraisers; she remained on the premises; she is there yet; she claims one room up stairs and one down; these are the same rooms mentioned in the will; she makes use of the spring-house, kitchen, and cellar, as they are left to her in the will; I live in the same house with her; she makes use of the stove, and has her part of the garden; I cut her wood, and hauled it for her last year; she gets the pasture and fodder; I give her the wheat every year; she got the hog all along too; she got the beef; she got the mare, &c., and has got them yet.

Benjamin Eberly.—I was present when the will was read, and *Mrs. Cauffman* was present. After the will was read, *Clendenin* asked if they were all satisfied, and they appeared all satisfied. He asked her whether she had any objections; she said she had objections; that a man of wealth like *Cauffman* did not allow her sufficient. We parted directly; not much said by her at the appraisement, whether she wanted the thirds or not; she took every thing that was bequeathed her in the will, the twelve hundred dollars and the other things.

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“Received *October 9th*, 1823, of *George Rupp* and *Benjamin Eberly*, the executors of *Christian Cauffman*, deceased, one riding mare, a new saddle and bridle, one bed and bedding, the case of drawers and table made by Mr. *Snively*, one cow and two sheep, and one ten-plate stove.

Her
Elizabeth × Cauffman,
mark.”

She gave the following receipt about six months or a year after the appraisement:—

“Received *December 27th*, 1823, of *Benjamin Eberly*, one of the executors of the last will of *Christian Cauffman*, one thousand two hundred dollars, in full, the sum bequeathed to me by my late husband, *Christian Cauffman*, deceased.

Her
Elizabeth × Cauffman,
mark.”

The demandant further gave in evidence as follows:—

“Whereas my late husband, *Christian Cauffman*, bequeathed to me certain privileges and certain specific legacies, which taken into consideration, I did not believe were such as ought to have been given to me out of so valuable an estate as he possessed, both real and personal. And, whereas it has been agreed between me and the principal devisees and legatees that *Isaac Cauffman* pay me, in addition to the bequeathments under the will of the said *Christian Cauffman*, the sum of four hundred dollars, in addition to the privileges and specific legacies as aforesaid.

“Now, know all men by these presents, that I, *Elizabeth Cauffman*, widow and relict of the late *Christian Cauffman*, late of *East Pennsborough* township, *Cumberland* county, for and in consideration of four hundred dollars to me in hand paid, do release and for ever quit claim to all the estate both personal and real of the said *Christian Cauffman*, deceased. I do release all dower and all right of dower to any lands or tenements of the said *Christian Cauffman*; and I release the executors, or heirs, from all suits of and on account of dower coming to me, excepting and reserving to myself, my heirs and executors, and administrators, all privileges, legacies, and rights under the will of the said *Christian* given to me; and also reserving all my right and dower to the real estate of the said *Christian*, situate in the borough of *Carlisle*: the parts thus reserved to be and remain vested in me, the same as if this release had not been given and executed. And it is expressly understood that I have refused to take under the will of my late husband, *Christian Cauffman*, deceased, and that I elect to take according to the intestate laws of this state, and that the foregoing release is a compromise with the devisees and legatees of

(Cauffman v. Cauffman.)

Christian Cauffman, deceased, so far as it affects *Isaac Cauffman*, *George Rupp*, and *Benjamin Eberly*; and that the reference to the will is only to designate the privileges, money and other articles, I am to receive from those, who by law are bound to pay the same to me. In testimony whereof I have hereunto set my hand and seal this 10th day of *November*, A. D., 1823.

Her
Elizabeth X Cauffman,
mark."

The court below charged the jury among other things as follows:—

The inquiry is, whether any acts were done or declarations made by the widow establishing her choice. When the will was first read to her, the witnesses say that she was dissatisfied, and said she should not abide by it. Other witnesses state that within a few days afterwards, when the appraisers were taking an inventory of the estate, she pointed out the articles willed to her, and objected to their being appraised. She remained in the house of her deceased husband and occupied the privileges willed to her. About two months afterwards she filed in the Register's Office a formal renunciation of all claims under the will, and made her choice of dower. I do not consider these unimportant acts done by her as concluding her right and preventing her from the election. The question is, was it a series of deliberate acts done under a knowledge of her rights, evincing a determination of her mind to take under the will, not to claim her dower; if so, then in law it would conclude her. But if there was no deliberate act, no decisive step, nothing done evincing her determination to take under the will, then in law she was not concluded from taking her dower. The paper filed in the Register's Office on the 10th of *November*, 1823, is an unequivocal act clearly evincing its object. In it there can be no mistake. But if it is said after this, that the widow claimed and took under the will, that she held and enjoyed the privileges specified in the will, and received the money bequeathed to her; if these were so, and remained unexplained, it would demonstrate her choice notwithstanding the paper filed. But these matters seem to me to be satisfactorily explained. On the 10th of *November*, 1823, the same day the paper was filed, the widow, *Benjamin Eberly*, *Isaac Cauffman*, and *George Rupp*, the principal devisees and legatees under the will, met and entered into an engagement; she released the parties named from her choice of dower on their estate derived from her husband, on their agreement that she should receive the articles and money specified in the will, and a further sum of four hundred dollars not under the will. But it is with clearness and precision specified in that agreement that she refused to take under the will, and that she did expressly state in the agreement that she refused to take under the will. It is proved

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by *B. Eberly, I. Cauffman*, and others, that they and *Rupp* did agree that she was to have the four hundred dollars beyond the sum mentioned in the will, and the same articles that were specified in the will; and after this agreement, and after this suit brought, we find the receipt of the widow to *B. Eberly* for the articles, and also at a subsequent period for the twelve hundred dollars. I see nothing to preclude these persons from making the agreement with the widow. They had large interests under the will and were residuary legatees of the personal estate. Why might they not specify what they would allow her in consideration of her release as to them, and agree with her that such an agreement should not affect her right to election, as it regarded other lands of her husband devised to other persons? It is to be remembered that *Eberly* was the acting executor. In case a widow refuses to take under the will of her husband, and elects her dower, I am not certain that she would not be entitled to the portion allowed by the intestate laws; but of this I have my doubts. It is not necessary to decide: but if such was the view of the parties to the agreement, and no order to settle all disputes about it, it was intended that the articles and money should go to her as her portion of the personal estate, agreeably to the intestate laws, I cannot see how that would take away her right of election, for still she would not have received them under the will, but without as opposed to the will.

To this charge the defendant excepted, and the jury found a verdict for the plaintiff.

Penrose, for the plaintiff in error.—The devise was in satisfaction of dower, and put her to an election. She actually entered into the property devised in the will. *Hamilton v. Buckwalter*, 2 *Yeates*, 389. Fifty pounds taken under the will is an election. 3 *Yeates*, 79. Acceptance of part is conclusive. 10 *Johns*. 30. So of an annuity. Here the plaintiff agrees to take under the will, although she denies it. He cited, also, 2 *Mad. Ch.* 41, 42, 43. *Adsit v. Adsit*, 2 *Johns. Ch.* 452. *Wilson v. Hamilton*, 9 *Serg. & Rawle*, 427. 6 *Johns. Ch.* 35. If the widow release the remainderman, it will inure to the release of the tenant for life. 2 *Bac. Ab.* 384. Here the release to one will be the release of all; as otherwise the defendant below would have contribution. It is the same as a release of one of two joint obligors. 1 *Ves.* 235. 1 *Bac. Ab.* 702.

Carothers, contra.

Metzgar replied.

The opinion of the court was delivered by

DUNCAN, J.—One thing is very certain, that the widow holds every thing specifically bequeathed to her by the will of her husband, to the smallest particle, and now enjoys all the privileges of the property devised to *Isaac Cauffman*, according to the will of her husband; and it is equally certain that so holding her bequests,

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if she succeeds in this action, she defeats the will and deprives the plaintiff in error of every thing that his grandfather intended, and nothing is more certain than that by the express provision of the acts of the 4th of *April*, 1794, and 1st of *April*, 1811, these bequests are in bar of dower, leaving her her choice either to demand her dower, or take to the bequests,—her choice she has not testified in the manner prescribed by the act of 1811. That is to be on a citation issuing from the Orphans' Court, calling on her to appear in the Orphans' Court, either to elect such bequest or devise, or waive it and take to her dower; of which election a record is to be made, which shall be conclusive on all parties. This election is to be made by the widow personally appearing in court. Of this personal appearance and election a record is to be made.

The paper filed on the 10th of *November*, 1823, with the register was altogether extrajudicial, and was no more a compliance with the direction of the act, than if it had been filed with the cryer of the court. Not only is the fact as I have stated it, but the forms used to enable her to take both the bequests, and the dower in this infant's house, however ingenious the expedient may have been, shows that she stuck to the will as to all the benefits to be derived from it, though she was desirous of avoiding the effect of such an act. The election of the demandant, filed in the Register's Office, is dated the 10th of *November*, 1823, and the agreement between the devisees and the principal legatees, as *Cauffman*, and the two sons-in-law, *Eberly* and *Rupp*, are styled, and the release to the executors or heirs was of the same date, witnessed by the same persons, the counsel of *Isaac*, and *Eberly* and *Rupp*.

These papers are to be considered as the same transaction, done *uno flatu*, and for the purpose clearly of the demandant's taking under the will, without the legal consequences flowing from such an act. The election in the paper filed in the Register's Office, is an election to take according to the intestate laws, and a refusal to take under the will. But, take this in connexion with the concomitant agreement,—stating that the consideration was an agreement to take from *Isaac* four hundred dollars, in addition to the bequests under the will, and in addition to the privileges and specific legacies,—there is no ambiguity. “Whereas it has been agreed between me and the principal devisees and legatees, that *Isaac Cauffman* pay me, in addition to the bequests under the will of the said *Christian*, the sum of four hundred dollars, in addition to the privileges and specific legacies.” And, in the releasing part, it is a release of all the estate, “both real and personal, of the late *Christian Cauffman*, and all dower, or right of dower, to any lands or tenements of the said *Christian Cauffman*, and all suits for or on account of dower to the executors or heirs,—excepting and reserving to myself, my heirs, executors, and administrators, all privileges, legacies, and rights, under the will of my husband given to me; and also reserving all my right of dower to

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the real estate of the said *Christian*, situate in the borough of *Carlisle*, the parts thus reserved to be, and remain vested in me, the same as if this release had never been given or executed."

Now nothing can be clearer than the substance of this agreement: It was an agreement that she should take all given to her by the will, and, in addition, receive four hundred dollars. And, in the very same words that she reserves her right to all the privileges, legacies, and rights under the will, she reserves her right to dower to the property in *Carlisle*. Then comes the *salvo*:—"And it is expressly understood, that I have refused to take under the will of my late husband, *Christian Cauffman*, and that I elect to take according to the intestate laws of this state, and that the foregoing release is a compromise with the legatees of *Christian Cauffman*, as far as affects *Isaac Cauffman*, *George Rupp*, and *Benjamin Eberly*, and that the reference to the will is only to designate the privileges, money, and other articles, I am to receive from those who by law are bound to pay the same." We are not to be governed by the sound of words, but by the substance. By the words, it was a compromise, an agreement, that she should have all given to her by the will, and a reservation of all her rights to the personalty given to her by the will; and the *salvo* is to guard against the legal consequences arising from that agreement and reservation. And, in point of fact, she did take all under the will—all given to her by the will. She could not take it by agreement with *Isaac Cauffman*, and *Rupp* and *Eberly*—it was not theirs to give, as I shall presently show, if she had renounced it; for if she took to her dower, then she was bound to surrender up to the disappointed devisee, *John Cauffman*, by way of compensation or satisfaction, every thing given to her by the will. It did not go to the residuary legatees, nor to *Isaac Cauffman*; and it will not escape observation, that, in the concluding lines of the *salvo*, in speaking of the privileges, money, and articles "I am to receive from those who by law are bound to pay the same," all those acts were done and the papers prepared by her own counsel, and the counsel of *Isaac Cauffman*, and *Rupp* and *Eberly*; and, so far as respected themselves and their own interest, it was very well; but, so far as respected the plaintiff in error, he was no party to it; he was an infant; neither himself nor his guardian consented, and it was an agreement sacrificing his interest. The parties took care of themselves—their acts bound them—and of their acts he may take advantage, and of the legal results of their acts.

The receipts of *Elizabeth Cauffman*, the demandant, whatever may have been the real dates, to the executors for the specific articles, show that she received from the executors, in their character of executors, and in pursuance of the will; and the receipt for the money legacies, explicitly and conclusively proves what the real transaction was:

"Received of *Benjamin Eberly*, one of the executors of the

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last will and testament of *Christian Cauffman*, one thousand two hundred dollars, in full, the sum bequeathed to me by my late husband, the said *Christian Cauffman*."

These papers, the work of the parties to the original agreement, carefully read over to her when she signed them, show what this transaction really was: that the demandant should take all under the will; but it was to be so conducted, that she should appear to acquit them under the will, but would take them by way of compromise from those who had no power to give them in any other character than as executors.

It may be said, that these subsequent acts were acts of ignorant people, unacquainted with legal forms. It may be so, or it may not be so; but it clearly shows their understanding of the transaction, and they had sufficient knowledge of their own intentions and views. It may be true enough that the counsel did not draw the receipt in this form: it may be true enough they may have recommended a *salvo* to be adopted; but these receipts incontestably and conclusively prove acceptance and election under the will, the real undisguised intention. The papers, taken together, prove the character in which she took the legacies—a legatee; and the character in which the persons stood who were the executors, executing the last will and testament of the testator. There is nothing equivocal in this. She could take them in no other character than that given to her by the will, the executors could give them in no other character, and I think amount to conclusive evidence of election: they recite the character in which she claims them. However it may be as to others, as to *John* it was an acceptance and election. It matters not how they concealed the matter, the question is, did she take them under the will?—no matter whether by compromise or otherwise. The agreement was, that she should have them in addition. The reservation of them in the release was a reservation under the will:—"reserving to me all the privileges, legacies, and rights under the will of my late husband given to me." And the evidence is, that she constantly has possessed all these rights and privileges, in literal and exact conformity to her husband's will, down to the very table made by Mr. *Snively*. How, then, can it be said that she renounced the bequest when she reserves these, when she constantly has enjoyed that? How could she be said to renounce that which she in terms reserves?

The doctrine of election has long prevailed; it has undergone many modifications. The cases cannot all be reconciled; but these clear principles may be deduced from them: It is a conclusion in equity, that where any person having a claim on a man's estate independently of him, and also a claim on his estate under his will, which claims are repugnant to each other, pursues the former, the latter is thereby waived or abandoned. This was the case of *Noyes v. Mordaunt*, 2 Vern. 581, and *Streatfield v. Streatfield*, Talbot, 176. In other cases it is put in this way: that no one claiming

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under a will, shall have any part of the estate to the disappointment of those to whom it is given by the will. If they will have the estate, chancery will take away their legacy. You cannot come into a court of justice claiming repugnant rights. The principal question is, whether such taking induces absolute forfeiture, or only imposes an obligation to indemnify the claimants when it disappoints them. In *England*, though decisions and *dicta* have been both ways, the latest authorities seem to sanction the doctrine of compensation: that when a case of election is raised, it does not give a right to retain the thing itself, though it gives a right to compensation out of the thing devised to a legatee attempting to defeat the devise to others. Chancery would sequester the thing devised, to make compensation and satisfaction to the disappointed devisee. This subject is very fully considered in a note to 1 *Swanston Ch. Rep.* 425, in which all the cases extant are reviewed. But the difficulty with us would be, how to get at the compensation. A conditional verdict, under the equitable powers of the court, restraining execution till the compensation has been made, or the amount of the legacy and bequests to the widow applied, has not yet been adopted. So far as I have any knowledge of the practice, it has been considered as a bar to the recovery. In *Miller's Lessee v. Gibson*, this was so considered by the court of *Nisi Prius* at *Carlisle*, by Justices YEATES and SMITH; and in *Hamilton v. Buckwalter*, 2 Yeates, 392, M'KEAN C.J., said, the entry and possession of the widow upon the land devised to her, was not a suspension merely, but an utter extinguishment of her right of dower. But the acts of assembly to which I have referred, seem to put the question at rest, by enforcing the widow to make choice: if she does so make choice, and has not done any act previously to determine her election, before she can take under the will she must renounce her dower. But, in the present case, I think the demandant has made a binding election, and one that bars her recovery. The agreement and receipts to the executors, are, in my mind, conclusive. The determination of her election was by plain and explicit acts. Her bare receipt for the articles bequeathed to her would not have been sufficient; but the agreement, release, and receipts, taken in connexion with the document in the Register's Office, was with full knowledge of the circumstances of the testator and her own rights—unequivocal acts, performed not in ignorance, but with full knowledge; not by inadvertency, but by choice; and where the demandant cannot restore the plaintiff in error to the same situation, as if these acts had never been done. But even if she were yet at liberty to make her election, it must be by surrender to the disappointed devisees of all the bequests under the will, or their value. This should be a condition precedent—tender before action brought: in no other way could compensation or satisfaction be made. In case of her rejecting the will, the property did not vest in either the executors or the residuary legatees: if they

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agreed that the widow should hold it, and that she has the right to it, it could only be for the reason that she accepted it under the will: if she did not, she could neither reserve it, nor they relinquish it. Chancery would sequester for the purposes of the will: if they would sequester the fund for that purpose, on the principles on which equity is distributed in this country, the satisfaction should be made in the first instance,—it should be the first step.

By the doctrine of sequestration to make compensation, the intention of the testator, so far as circumstances will admit, is effected; by the doctrine of forfeiture, that intention, in many cases, would be defeated. If, in *Pennsylvania*, the forfeiture would not be exacted absolutely, still it would be a forfeiture, until the party made compensation and satisfaction. But though the usual course, in *England*, is to resort to a court of equity, because at law the party cannot be put to elect, yet even courts of law apply the principle of election; and it is a good defence in a court of law, where the party has acted upon it in such a manner as to be concluded by what he has done; that is, to have elected. But if it be a matter only in equity, equity would grant relief in case of a recovery at law in an action of dower, where the devise was in bar of dower, (as all devises here are, by positive law,) and carry into execution the trust of the will. 2 *Vern.* 366. For a history of this case, see note to 1 *Swanston*, 398. If there had not been an election here, then how would the case stand? *John Cauffman* and *Isaac Cauffman* would, if the widow proceeded against them in a claim of dower, be entitled to the bequests to the widow, each in proportion to the value of the land devised to them. But I judge the widow to have so acted, to have so elected to take to the will wholly, (for she could not do it partially,) as to have foreclosed herself from now maintaining this action of dower. I have not considered it necessary to go formally through all the objections made to the opinion of the court. The way in which it was argued, and properly argued, too, was, on one general objection—on the doctrine of election—on which the cause mainly rested.

It is proper to notice the doubt expressed by the court as to the widow's right to the personal property, on her repudiating the will, under the intestate law. There is no foundation for this doctrine. The husband can strip his wife of all the personal property by the will; and so he has done here, except so far as he has bequeathed her; and the jury would naturally be misled by what the court say, or their supposition, "that the agreement of the parties was or might have been, that the money and articles bequeathed to her, should go to her as her part of the personal estate, agreeably to the intestate laws: and that would not alter the case, for she would not have received them under the will, but in opposition to the will." There is no evidence of any such mistaken views between the parties. The highly respectable counsel who advised the measure did not fall into this error, or lead their clients into it.

(Cauffman v. Cauffman.)

I add, in conclusion, that the claim of the widow is to deprive the defendant of the whole property devised to him, to defeat *in toto* the provision intended by his grandfather, clear of taxes and repairs. The house would not rent for more than two hundred dollars,—the charge of three thousand dollars to be paid to his brothers and sisters: the interest of this money would leave him little more than twenty dollars per year; and, if the widow recovers in dower, instead of a benefit it would be a burden to him. Rights of widows to dower are favourite rights, but are not to be favoured by the sacrifice of the interest of others. Now, here, the sacrifice of the rights of this infant is very apparent. *Rupp* and *Eberly* had nothing under the will which could be affected by any claim of dower. *Isaac's* estate, though much more valuable than *John's*, is compromised by giving up to the widow every thing given to her by the will, and four hundred dollars,—twenty-four dollars per year; so that this compromise is effected by taking the compensation which *John* would be entitled to by the rejection of the will, to make up a consideration to the widow for the release of *Isaac's* lands from the claim of dower. And, though it doth not appear on the record, yet it is admitted that *Rupp* and *Eberly*, the sons-in-law, held lands by conveyance from the testator, in which the demandant did not join; so that all gained but *John* by this compromise, made at his expense, and with the consideration that *John* would be partly entitled to some compensation. These sons-in-law would not be entitled to any satisfaction, if the widow had recovered in dower from them. *John* could neither recover from *Isaac* nor from the executors, any satisfaction, as has been supposed by the defendant in error. It is admitted *John* should have satisfaction somewhere, from somebody, out of the thing devised to the widow. From the widow he cannot gain it, because she has given the executors a receipt for it, under the will: they stand acquitted from *Isaac*: he cannot gain it in any form of action; and, unless he can retain the thing devised to him, he is without remedy. The widow took the whole devised to her from the executors, and in exact and literal conformity to the will. The parties, by their agreement and release, attempted to do that which the law would not allow; viz. to take the thing devised to her, and defeat the will of the testator, as to the devise of *John*. Instead of declining altogether by her deed all claim under the will, she reserves in explicit terms all her bequests under it; in addition to this, she is also to have the compromise from *Isaac*,—four hundred dollars. This was a clear, manifest assumption of property, by virtue of the will. She certainly never did relinquish her claim under the will, but reserved it, exacted it, and received it from the executors, and now enjoys the particular privileges in the mansion house of the testator. She accepts the benefit, while she declines the consequences. She says, "I reserve all benefits under the will of my husband; but I shall retain to myself the right to disappoint *John* of what his grandfather has given

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him. She takes the benefit of the bequest, though she discards the condition annexed to these bequests—not to disappoint *John*, the devisee. Now, to accept the benefit, while she declines the burden, is to defeat the design of the donor. I hold she cannot say, “I will retain what is given me by the will with a *salvo*, that I do not mean by this to give up *John*. My intention is, to take both the bequest and the dower out of his estate.” Now this she cannot do.

Equity, if she had not made her election, and had brought a writ of dower, would stay her suit at law. The earliest case on this subject, is noticed, 1 *Swanston Ch. Rep. (in note,)* 397, which was a suit at law in a writ of dower, brought by the defendants. The bill for relief stated, that the defendant’s wife had certain copyhold lands devised to her in lieu of her thirds at law, which she accepted and enjoyed twenty years, and yet seeketh now to recover dower of the freehold lands. The defendants demurred, because copyhold lands can be no bar to dower; but the court say, that it is no conscience she should have both, and therefore ordered to answer. The defendants were afterwards permitted to proceed to a judgment on the trial at law with stay of execution. Wherever chancery would restrain execution, our courts of common law would hold there should be no recovery, as this is the only way in which equity could be administered; for the conditional verdict and judgment, though frequently resorted to, to enforce equity, yet never have been applied to cases of election. But the election and acceptance here were perfect, and the right to choose *again* extinct.

I am therefore of opinion, for all these reasons, that the judgment should be reversed.

ROGERS, J.—I will briefly state the reasons of my dissent from the opinion just delivered. I throw out of view the acts of the widow, previous to the 10th of *November*, 1823; for I admit that if these acts amount to an election to take under the will, she cannot afterwards have her dower at common law. On the first point, these were properly left by the court to the jury, with the expression of the opinion, in which I concur, that they were unimportant acts done by her, and did not conclude her rights, nor prevent her from her election.

I discard, also, all idea of combination and fraud, for such was not pretended in the Court of Common Pleas; and is thrown in here, as a mere make weight in a question, I apprehend, of mere law. If the jury should believe there was actual fraud, there would be an end of the controversy; but the persons who were concerned in the settlement of this business, forbid all supposition with me that this was the case.

That this is the case of election is not doubted; the widow cannot claim under the will, and at common law. The devise to the widow is not expressly in lieu of dower, but it is made so by

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the 10th section of the act of the 4th of *April*, 1797, with an express saving of her choice either of dower, or the estate devised. It may be as well here to observe, that it is not necessary the widow's election be made in the Orphans' Court, but in one event; that is, when she has not made her election within twelve months from the death of the testator. The act of assembly does not preclude from her election, before the expiration of that time; and I know of no place where it can be more properly made than in the office of the register, which has jurisdiction of the probate of wills.

By the instrument of the 10th of *November*, 1823, she manifests her intention, by an unequivocal act, by which she was absolutely bound; for it is not pretended, but it was voluntarily done, and of her own free will and accord. It was a determination of her election, which may be either by express words, or by act. 3 *Com. Dig. title Election*, 540. After this solemn act, she was entitled to her dower, and nothing else: she could not take under the will, without the consent of those who had interest under it. Their rights vested and could not be divested without their assent. An equivocal act may be explained, but not such an act as this. The election may be kept open for twelve months, but when once made, it concludes the parties. 3 *Com. Dig. title Election*, 540.

Standing in this situation, the widow came to the agreement of the 19th of *November*, 1823, with *Isaac Cauffman*, and the residuary legatees, and the executors of the will.

It will, I am sure, be conceded that her right of dower; in the lands of *Isaac*, was a fair article either of sale, or compromise. This free privilege has never yet been denied her, and, I trust, never will. If *Isaac* and the residuary legatees, or the executors, had agreed to give her one thousand pounds for her right of dower in his land, it would surely have bound them; and *John Cauffman* would have had no right to complain. It would have been open to him, to make the same compromise. But the argument is, that because they undertake to give, and she accepts the same property devised her by the will, that their acts amount to an election to take under the will. The principle is not denied, that a person shall not claim under an instrument, without giving full effect to that instrument, as far as he can. 2 *Mod.* 640. 2 *Vern.* 581. 2 *Vern.* 617. 2 *Atk.* 629. The question here is, does she take under the will, or the agreement of the 10th of *November*. If ever there was care taken to exclude a conclusion, it has been done here. The parties to the agreement expressly say, that the release is a compromise with the devisees and legatees of *Christian Cauffman*, so far as respects *Isaac Cauffman*, *George Rupp*, and *Benjamin Eberly*, and that the reference to the will, is only to designate the privileges, money, and other articles she is to receive from those, who, by law are bound to pay the same. She also expressly refers to the filed paper of the 10th of *Novem-*

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ber, and again confirms and solemnly ratifies it. In the face of all this, we are gravely told, that the acts of the widow amount to an election to take under the will. By a system of legal metaphysics, which I cannot comprehend, the counsel for the defendant in error compel her to elect contrary to her intention.

But what is the justification of this? It is said, at the bar, that after she expressly disclaims all intention of taking under the will, yet she now enjoys the articles devised to her by the will. If the interest of *John Cauffman* were affected, there would be some show of sense in the argument. It is, however, plain, that he is placed in no worse situation by the arrangement, for the grandson has the same right, and the same remedies, as if the compromise had not been made. Had the widow, without entering into agreement, recovered her dower, what would have been his remedy? He would have been entitled to a compensation, for his proportional share of the privileges relinquished by the widow, and the remedy would have been by an action against *Isaac*, and the executors. Although the course of a Court of Chancery would be to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee; yet, in *Pennsylvania*, where we have no Court of Chancery, it is submitted there is no such power: the articles would go into the hands of the executor, he would have a legal right to them; they would be subject to his disposition. The land of *Isaac* would have been discharged from the burden imposed by the will. The action then would have been against the executor, and the owners of the land, for a compensation, and the jury would have been directed to give such damages as were right, under the circumstances of the case. The measure of damages would be the value of the articles and privileges relinquished, and that in proportion to the respective value of the dowers recovered. If this suit prevails, he has precisely the same remedy and no other. How then, has he a right to complain of the agreement, when his rights are not affected? He would not, I expect, be entitled to the articles, but a compensation, to be ascertained by suit. But, if we adopt the argument of the plaintiff in error, the loss is thrown upon the widow, by a construction in express contravention of the intention of all the parties to the agreement of the 10th of *November*, 1823. In my view of the case, justice would be done to all. On the contrary, the widow loses all.

But it has been said, that the legatees are not parties to the contract. This idea was not hinted at in the Common Pleas: it was left to be discovered by legal ingenuity here. They were present when the agreement was made, took possession of it, put it on the record, and performed their part of the agreement, by payment of the money, and by putting the widow in the possession of the articles referred to. It would require some assurance for them, now to allege they were not parties to the agreement.

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The law regards substance, not shadows. They do not now make the objection: it is *John Cauffman* expressly, not a party, and who I have shown is not injured by the arrangement, who takes the objection. On the best consideration which I have been able to give this case, I am of the opinion, that justice and the law of the country requires, that the judgment of the Common Pleas be affirmed.

Judgment reversed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

PURVIANCE and others *against* The COMMONWEALTH,
for JOHN ALEXANDER'S Administrator.

IN ERROR.

Where a balance remains in the hands of the administrator, the usual mode of designating the persons entitled, is by action at law: but the Orphans' Court, on the petition of any one interested, would be bound to proceed, and decree distribution.

In such proceeding, notice should be given as far as the nature of the case admits, and the whole subject should be acted on.

A decree leaving it uncertain who were the parties designated, is void.

A plea to an action founded on such decree, that the plaintiff is not the person named therein, is a good plea in bar.

ERROR to the Court of Common Pleas of *Franklin* county, where a verdict and judgment were rendered in favour of the plaintiff below, and defendant in error, the commonwealth, for *John R. Latimer*, administrator of *John Alexander*, against *Purviance, Crawford* and others, defendants below and plaintiffs in error. The case was tried before the associate judges of the court below.

Scire facias to recover a share of the estate of *John Alexander*, who died in 1798. Plea *nil debent*. The share of the plaintiff was stated to be one tenth.

On the 15th of *September*, 1800, the first administration account of *John Calhoun* and *Samuel Purviance*, administrators of *John Alexander*, was settled, stating a balance of two thousand seven hundred and forty-four dollars and fifteen cents, in their hands. The second administration account was filed on the 9th of *March*, 1813, and confirmed on the 8th of *June*, 1813, by the Orphans' Court, finding a balance in the hands of accountants, for distribution according to the decree of the court thereto annexed, thirteen thousand, two hundred and seventeen dollars and eighty-five cents.

A feigned issue was tried in the Circuit Court of that county, entered in 1805, in which *William Alexander*, *Andrew Galbraith*, and *Jane*, his wife, *Oliver Alexander*, and *Elizabeth*, his wife, *Richard Duffy*, and *Martha*, his wife, were plaintiffs; and *William Jamieson*, and *L.* his wife, *John Stewart* and,

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Margaret, his wife, *Robert Gilleland*, and *Esther*, his wife, *Thomas Auld*, and *Elizabeth*, his wife, ——— *Tate*, and *Agnes*, his wife, *John Alexander*, ——— *Huston*, *John* ———, and *Jane*, his wife, *Agnes Milligan*, and *Quentin Anderson*, and *Nancy Ann*, his wife, were defendants: and on the 9th of *April*, 1811, there was a verdict for the defendants. This appeared by the docket entries; but it was admitted that the declaration and other papers in the cause, could not be found; and that Mr. *Duncan* was the counsel of the defendants in that action. It was also admitted, that Mr. *M'Cullough* was the counsel of the administrators of *John Alexander*, in stating and presenting and settling the second administration account.

The plaintiff next offered in evidence, a paper dated the 17th of *April*, 1813, in the handwriting of and subscribed with the initials of *J. Hamilton*, deceased, late president of the court, and the endorsement of sums on the same in the handwriting of Mr. *M'Cullough*, and also two papers attached thereto, in the handwriting of *Thomas Duncan*, Esq., marked, "filed *October*, 1812, and *November*, 1812." It was admitted that the said papers came from the office of the clerk of the Orphans' Court. This evidence was objected to by the defendants, but the court received the evidence, and the defendants excepted.

The following was the decree above-mentioned:

No. 458, administration of *John Alexander*. On the administration account, the court made a decree as follows:

It appears to the Orphans' Court, that although the legislature, evidently, under our intestate acts, have preferred representation in every case where there is a survivor of brother or sister, or survivor of any class of the next of kin, it seems to be otherwise when there are no survivors. Here all the uncles having died, and the issue being all cousins, all equally next of kin to the intestate, at the time of his death, the court is of opinion that this is a case not contemplated by the act, so as to divide the intestate's estate *per stirpes*. The decision in *England*, on a statute nearly in the same words, has been according to this construction.

Where there is a survivor, it is reasonable to prefer him: and that principle adopted as to him, carries the distribution throughout. Here all are equal—all are next of kin, and there seems to be no reason for inequality of division. If the contrary was intended by the legislature, it is a *casus omissus*. The court, therefore decree, that distribution of the intestate's estate be made among all the persons named; they being cousins, and being in equal degree to the intestate.

J. H.

(Endorsed,) This decree to be open to an application for consideration at next term, if required.

J. H.

The following was the paper in the handwriting of Mr. *M'Cullough*, found endorsed on the back of the foregoing decree, and it

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was conceded to have been made as a memorandum some time after the papers had been filed.

The distribution according to the within decree is as follows; to wit:—

	<i>Dols.</i>	<i>cts.</i>
<i>John Alexander</i> , one share, - - -	1320,	78½
<i>William Jamieson</i> and wife, one share, -	1320,	78½
<i>John Stewart</i> , and <i>Margaret</i> , his wife, -	1320,	78½
<i>Robert Gilleland</i> , and <i>Esther</i> , his wife, -	1320,	78½
<i>Thomas Auld</i> , and <i>Eliza</i> , his wife, -	1320,	78½
<i>Agnes Tate</i> , - - - - -	1320,	78½
<i>Mary Huston</i> , - - - - -	1320,	78½
<i>Jane Milligan</i> , - - - - -	1320,	78½
<i>Agnes Lauson</i> , - - - - -	1320,	78½
<i>Quentin Anderson</i> , - - - - -	1320,	78½

On a separate piece of paper, in Mr. *Duncan's* handwriting, was the following:—

Distribution to be made, subject to a supplemental account, to be rendered by administrators, and to a further allowance to be made to them.

The defendants in the feigned issue, who represent the intestate, submit to the court to decree in what manner distribution is to be made. *John Alexander* died intestate since the act of 1794, leaving at his death his next of kin of equal degree, and his sole representatives,

1. *John Alexander*, *William Jamieson* and *Livy*, his wife, late *Livy Alexander*, *John Stewart* and *Margaret*, his wife, late *Margaret Alexander*, *Robert Gilleland* and *Esther*, his wife, late *Esther Alexander*, children of *Hugh Alexander*, who was the brother of *William Alexander*, the father of the intestate. (4)

2. *Thomas Auld* and *Eliza*, his wife, late *Eliza Alexander*, *Agnes Tate*, late *Agnes Alexander*, children of *John Alexander*, a brother of *William Alexander*, who was the father of the intestate. (2)

3. *Mary Huston*, the daughter and only child of *James Alexander*, the brother of *William Alexander*, who was the father of the intestate. (1)

4. *Jane Milligan* and *Agnes Lauson*, children of *Jane Lauson*, sister of *Isabella Lauson*, who was the mother of the intestate. (2)

5. *Quentin Anderson* and *Nancy Ann*, his wife, the daughter and only child of *Robert Lauson*, the brother of *Isabella Lauson*, the mother of the intestate. (1)

The court direct distribution to be made amongst the parties above stated, under advisement, and will decree the several distributive parts under the intestate act on the Monday of *November* term.

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In the handwriting of Mr. *Duncan*.

Distribution decreed, subject to a supplementary account, to be rendered by the administrators, and subject to any further allowance the court may make to the administrators, to wit:—One fifth part to *John Alexander*, *William Jamieson* and *Livy*, his wife, late *Livy Alexander*, *John Stewart* and *Margaret*, his wife, late *Margaret Alexander*, *Robert Gilleland* and *Esther*, his wife, late *Esther Alexander*, the children of *Hugh Alexander*, who was the brother of *William Alexander*, the father of *John Alexander*, the intestate.(4)

One fifth part, to *Thomas Auld* and *Eliza*, his wife, late *Eliza Alexander*, *Agnes Tate*, late *Agnes Alexander*, and *John Alexander*, children of *John Alexander*, a brother of *William Alexander*, who was the father of *John Alexander*, the intestate.(3)

One fifth part to *Mary Huston*, the daughter and only child of *James Alexander*, the brother of *William Alexander*, who was the father of *John Alexander*, the intestate.(1)

One fifth part to *Jane Milligan* and *Agnes Lauson*, children of *Jane Lauson*, the sister of *Isabella Lauson*, the mother of the intestate, to hold as tenants in common. And one fifth part to *Quentin Anderson* and *Mary Ann*, his wife, the daughter and only child of *Robert Lauson*, brother of *Isabella Lauson*, the mother of the intestate.

The defendants gave in evidence the receipt of *John Alexander*, dated the 2nd of *March*, 1819, for two hundred dollars, and then proposed to add the plea, that the plaintiffs ought not to have or maintain their action aforesaid, against them: because they say, that the said *John Alexander*, deceased, of whose estate, the said *John R. Latimer* is administrator, was not the said *John Alexander* mentioned in the decree of the Orphans' Court, recited in the plaintiffs' writ of *scire facias*, and was not one of the heirs of *John Alexander*, who died in *Chambersburg*: and this they are ready to verify.

The defendants also proposed to give in evidence, that *John Alexander*, for whose representative this suit is prosecuted, is the same *John Alexander*, to whom the said payment was made on the 2nd of *March*, 1819, and that he is the same *Alexander* for whose administration this suit is brought, and that the said *John Alexander*, to whom said payment was made, and whose representative the said *John R. Latimer* is, was the son of *John Alexander*, and not the son of *Hugh Alexander*. That there was a *Hugh Alexander* and a *John Alexander*, (uncles of the said *John Alexander*, who died in *Chambersburg*;) and that the said uncles, *Hugh* and *John*, left two sons of the name of *John Alexander*, who are cousins in the same degree, to the decedent *John Alexander*, who died in *Chambersburg*; and also offered to prove by the declarations of the said *John Alexander*, for whose represen-

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tative this action was prosecuted, and by other evidence, that there are several other cousins in the same degree; not named in the issue in the Circuit Court, or in the Orphans' Court; who are entitled in equal shares with the parties named, to a distributive share of the estate of the said decedent, *John Alexander*, who died in *Chambersburg*, as aforesaid. And the said *John Alexander*, for whose representative this suit is prosecuted, is not the *John Alexander* named in the decree of J. H., president of the court, given in evidence, or in the endorsement. And that the persons entitled as heirs in the same degree above-mentioned, and not named in the decree, as well as the said *John Alexander*, by whose representatives this suit is prosecuted, at the time of the said decree, and ever since, resided out of the *United States*, and that *John Alexander*, the son of *Hugh*, also resided out of the *United States*. To the admission of which plea and evidence, the plaintiffs objected, and the court refused to permit the pleadings to be amended, or to receive the evidence. To which opinion of the court, the defendants excepted.

The defendants requested the court to instruct the jury,

1. That the distribution made, as is alleged by the plaintiff, in the Orphans' Court of *Franklin* county, and as given in evidence, is not conclusive as to the said parties, being the only representatives of the intestate.

2. That other persons who stand in the same relation, though then unknown, are not barred of their claims by the omission to name them in such proceedings in the said Orphans' Court.

3. That it is incumbent on the plaintiff to make out with reasonable certainty all the heirs and representatives of the said testator, to enable him to recover what is the distributive part of his intestate, if entitled to any.

4. That it is uncertain what is the distributive share of the plaintiff's intestate.

5. That the plaintiff's intestate having in the receipt of 1819, given in evidence, described himself as *John Alexander*, son of *John*, is not entitled to recover a tenth part of the balance on the administration account, under the decree of the Orphans' Court of the said county, and under the evidence given in this cause.

6. That the plaintiff cannot recover in this action without showing by other proof than the decree of the Orphans' Court, that his intestate was one of the heirs of the intestate, and was entitled to a share of his estate, and was the person to whom the share was decreed: and as no such evidence has been given, the plaintiff cannot, therefore, recover.

7. That the plaintiff, if entitled to recover as an heir a distributive part, is not entitled to receive interest on such distributive share until after demand made.

The court directed the jury as follows:—

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1. That the proceedings and decree of distribution, made in the Orphans' Court, is, from the lapse of time and acquiescence, conclusive.

2. That the proceedings had, and decree of distribution made in the Orphans' Court, excludes unknown relations, if any such there be.

3. That the record of the Orphans' Court is a sufficient designation of the representatives of the intestate; and from it, under the pleading, the jury may find for the plaintiff.

4. That there is some uncertainty as to the sum now due, arising from the payment made, and interest that may be chargeable; of all which the jury is to judge, but the plaintiff is entitled to a tenth part according to the decree.

5. That the receipt of 1819, signed by *John Alexander*, as son of *John*, is no bar to the plaintiff's recovery.

6. That the evidence exhibited on the trial of this cause, may by the jury be considered, under the pleading, sufficient to warrant the plaintiff's recovery.

7. That if from the evidence the jury are of opinion, that the administrators used the money of the intestate as active private funds employed by them in business, they may and ought to be charged with interest thereon after a reasonable time from their final settlement at the Orphans' Court: but the jury is to judge from the evidence as to whether the administrators ought not to have, say, from one to five or six months after the said settlement, to vest the money before they be charged interest.

Chambers, for the plaintiff in error, stated the questions to be whether there was in fact such a decree as mentioned on the writ; and, if so, was it conclusive against the other representatives not named? He contended it was no decree in favour of particular persons, it was only the settlement of a principle. But, if there was a decree as to a particular person, we ought to be allowed to show that the plaintiff is not one of them. The Orphans' Court and Common Pleas have co-ordinate power to say who the heirs are; but certainly we had a right to file a new plea, if the evidence was not proper on *nil debet*. 13 *Serg. & Rawle*, 444.

Dunlop, contra.—Here is a decree, and it is conclusive. 11 *Serg. & Rawle*, 17, 37. The court will give operation to a decree, wherever it can. 9 *Serg. & Rawle*, 133. The court has the right to designate the distributees. The time of appeal having past, this decree is final and definitive, and not now to be inquired into. 11 *Serg. & Rawle*, 430. They ought to have pleaded in abatement, if we represented ourselves to be the *John* named in the decree.

The opinion of the court, DUNCAN, J., being absent, was delivered by

GIBSON, C. J.—As the Orphans' Court has jurisdiction of the subject matter of distribution, it may designate the parties entitled,

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and its decree will be conclusive. But so unusual is it to do so at the settlement, that I have never known an instance. The usual way is to confirm the account, stating the balance, where there is any, to be in the hands of the accountants, subject to distribution according to law. And this is the safest course where there is a doubt as to the persons entitled, because it leaves the matter open to deliberate inquiry in an action at law, instead of suddenly concluding by a decree the rights of parties who are not before the court and who seldom have actual notice. The Orphans' Court, however, would be bound to act on the petition of any one interested; but, in such case, it ought to exact all that the nature of the case admits of to give notice; and, even then, I would not hold myself concluded, unless it should appear to have acted on the *whole* subject. What is there here in the shape of a decree? We have a paper in the handwriting of the president, in which it is decided that distribution be made *per capita*; the conclusion of which is in these words: "The court, therefore, decree that distribution be made among all the *persons named*, they being cousins, and in equal degree to the intestate." Now, no persons were named except in two other papers in the handwriting of counsel, found tacked to the opinion of the president, each of which appears to have been presented separately as the basis of a decree: in one of which are found names of *ten* persons who were defendants in a feigned issue between them and an entirely different set of claimants; by which, if it were assumed as the basis, the present plaintiff would be excluded; and in the other *eleven* are named, among whom the plaintiff is included. Endorsed on what is called the decree, are the names and supposed shares of the ten persons who constituted the successful party in the feigned issue; but so far is this from having been the act of the court, that it is conceded on all hands to have been a memorandum of counsel, and made several months after the paper was filed. The reference, therefore, if it be to these papers, is altogether uncertain; and if it be not, it is a reference to nothing. The paper was no doubt intended as a memorandum of the opinion of the court as to the principle of the decree, leaving its details to the counsel and the clerk when it should come to be made up in form and entered on the record. The late President HAMILTON, who was one of the ablest and most careful judges of the Orphans' Court of whom I have any knowledge, would never have considered his decree perfected by filing a paper such as this; from which it is evident that he viewed the matter before him as a preliminary question; and that he did not consider himself as deciding between individuals, but classes. But, were this otherwise, the decree would indisputably be void for uncertainty.

But, were it even conclusive, the defendants ought to have been permitted to show that the plaintiff was not entitled under it; and

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this, either on the plea of *nil debet*, which was already on the record, or the special plea which they tendered at the trial, and which by force of the act of assembly was clearly admissible. It did not propose to give the plaintiff a better writ, but to bar him of his demand. The defendants pleaded that the plaintiff's intestate was not the *John Alexander* mentioned in the decree; and if this be in abatement, it would be equally so in an action on a bond to plead that the plaintiff and the obligee are different persons. The error in this respect is palpable; but on both grounds the judgment is to be reversed.

HUSTON, J.—There are some things unusual in this case. The case was before the Orphans' Court of this county. That court alone can decide who are the persons entitled to distribution of the estate of an intestate, and the amount due to each; this, by the express words of the bond in the first section of the act of 1794, and the concluding clause of the said section, and by every clause and section in the act which have any bearing on the subject: this is subject to appeal, and no other court has jurisdiction of this matter. The Orphans' Court of this county had two sets of claimants before them; one set who alleged the intestate to have been their kinsman; another, of a different family, from another part of *Ireland*, claiming him to have been of their family. An issue was found and tried, taken to the Supreme Court, and affirmed. It is singular that the order for this issue and the whole record are not now to be found. Who directed the trial, and what was to be tried by that direction, we must collect from parol proof, or from inference from some things which do appear.

After this trial one set of claimants disappears; the other comes into the Orphans' Court and claims the estate. At first a scheme of division into five parts, dividing it *per stirpes*, was submitted to the Orphans' Court: in this the defendants in the feigned issue are all named, and one other is named, or the name of *John Alexander* is twice introduced.

This mode of division was not adopted by the court; but the paper on which it is drawn up is found in the office of the Orphans' Court, and is annexed to the following paper; commencing, "The defendants in the feigned issue, who represent the intestate, submit to the court to decree in what manner distribution shall be made. *John Alexander*, the intestate, died since 1794." And then proceeds to name all the defendants in the feigned issue, and states their pedigree, showing them to be the children of the uncles of the intestate, and that the uncles are all dead. The Orphans' Court made a decree, in which, after premising the facts, they say, "The court, therefore, decree distribution of the intestate's estate to be made among all the persons named, they being cousins and being in equal degree with the intestate."

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The administrators had settled their accounts, and the amount was known. On the back of the paper on which the decree is written, was endorsed—"Distribution according to the within decree, as follows:—

"*John Alexander*, one share, one thousand three hundred and twenty dollars and seventy-eight cents," and the same as to nine other names, being the names of the defendants in the feigned issue, and in the paper submitted to the court. This endorsement was in the handwriting of a gentleman of the bar who was counsel for the administrators. I consider this an absolute, and, being unappealed from, final decree of the Orphans' Court, deciding the persons entitled, and the sums to which each was entitled.

1. The objections to it are, that we have not the records of the feigned issue. I think we have enough to show that it was directed by the court; and what it was to decide, and did decide, and that it was adopted by the court. If we have not, we have a decree, independent of the feigned issue before us.

2. It is objected, that as two schemes of division were before the court, and in one of them eleven persons were named, and in the other ten, and as both have been put in the bundle of papers, it is uncertain which number the court had in view in the decree. I have no difficulty on this subject. The court adopted one of them; that which referred to the feigned issue, and it would be strange to suppose the phrase, *the persons named*, referred to a rejected paper.

3. The distribution endorsed, and the names of the ten, and sum to each, is not in the handwriting of the judge who wrote the decree, but of a gentleman of the bar. I, however, consider it as the act of the judge, done as if were by his clerk, a reader accountant and scribe, as read to him when completed and adopted by the Orphans' Court, and from that moment their own act. The general practice is, that when the account is passed the court order "distribution to those entitled according to law." This is the minute on the account. The clerk of the Orphans' Court, however, in all cases so far as I have known, writes on the record of the Orphans' Court at length the names of the distributees, and the sum due to each. This is done in the presence of the administrators, and is considered the act of the court, as such made out when a copy of the record is called for. In ordinary cases where parties live in the county, no difficulty arises or can arise: if the clerk has not leisure at the moment, he takes a memorandum of the names and makes the calculation, and completes the record at his leisure. Unfortunately in this case no record was ever made; all is yet on loose paper; still I consider this the decree of the court, made out, adopted, and decreed by them; for no human being who knows him who made it, can surmise it was done in any other way than as I have stated it; that is, to relieve the court from the labour of

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calculation and writing, and shown to them. But, if under our practice this was not conclusive, or for any of the above reasons should not be held so, after the lapse of time it ought to be *prima facie* evidence. *John Alexander* left *Ireland* in 1774; to bring proof by persons who knew him is not to be expected; witnesses who did not know him cannot tell who were his relations; we may as well give the estate to those in whose hands it is. The decree was made in 1812; the administrators have acted on it, paid some of the persons, and paid the expenses of feigned issues and the counsel of the defendants. It is too late for them to deny there is a decree.

By our law a man may put in a plea after the jury have been sworn, and if the other party is surprised and wishes time to meet it, the jury are dismissed, (on payment of costs by the party putting in the new plea in some districts;) this being by positive enactment, it is error to refuse such plea unless it is plainly frivolous or totally inconsistent with former pleas, (as *non est factum*, after another plea which expressly admitted the execution of the instrument and avoided the effect of it.) This case is singularly circumstanced; the distributees all live or did live in *Ireland*. The plaintiff sues as administrator of *John Alexander*. The defendant may put him to prove that the *John Alexander*, whom he represents, was the son of *Hugh Alexander*, of the parish of ———, in the county of ———, and the brother of Mrs. *Jamieson*, Mrs. *Stewart*, and Mrs. *Gilleland*, named in the feigned issue, and in the paper on which the decree is founded.

There was then error in this; and also in refusing to permit the defendants to prove that the plaintiff's intestate was not the son of *Hugh Alexander*, and not the *John Alexander* named in the feigned issue and the paper before-mentioned.

GIBSON, C. J., delivered the opinion of the majority; DUNCAN, J., and TOD, J., took no part.

Judgment reversed, and a *venire facias de novo* awarded.

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[CHAMBERSBURG, OCTOBER 31, 1827.]

REICHART *against* BEIDLEMAN.

IN ERROR.

In debt on a sealed note for a certain sum, the plaintiff is not permitted to give in evidence an agreement by the defendant, showing that the note was to be drawn payable with interest, and that payments made on account were appropriated to the interest.

For that purpose, the declaration should be for the interest also.

If the defendant examines a witness, the plaintiff cannot by cross-examination elicit such agreement, though it made a part of a conversation of which the witness had given evidence.

ERROR to the Court of Common Pleas of *Cumberland* county.

The plaintiff in error was plaintiff below, and brought this action of debt on a sealed note drawn by the defendant in favour of the plaintiff, dated the 21st of *January*, 1819, for three hundred and thirty-eight dollars and thirty-three cents, payable on the 1st of *May*, 1822. Plea payment with leave, &c. The plaintiff read in evidence the note, on which was endorsed, a receipt for two hundred dollars, on the 26th of *April*, 1822. The plaintiff then offered in evidence articles of agreement between the parties, dated the 21st of *January*, 1819, the execution of which was admitted, to show that interest was to be paid on the instalments, for one of which the note in question was given. And called a witness to prove the frequent acknowledgments of the defendant that he was to pay interest, and promises to pay the same. The defendant objected.

By the Court.—The suit is on the note, and the plaintiff must recover according to his evidence of debt. The agreement was no part of the original cause of action; nor the subject of an action of debt. Both the offers are rejected.

To this opinion the plaintiff excepted.

The article was for the sale of thirty-three acres of land, by the plaintiff to the defendant, “at forty dollars per acre, to be paid in the following manner: two hundred and twenty-five dollars on the 1st of *May* next; and the balance in three equal annual payments, with interest from the date of this article,” in a penalty of one thousand dollars.

The defendant offered to prove that the plaintiff admitted in the presence of a witness, (the justice before whom the suit was tried,) that the moneys referred to in certain papers produced, were paid by *Beidleman*, in the city of *Philadelphia*, by the plaintiff’s authority; and that he was to have a credit for the same on the note on which this suit was brought.

To which the plaintiff’s counsel objected, because, as was admitted, Mr. *Hamil* was alive and in this county, and *Worrals* and

(Reichart v. Beidleman.)

Richardson were alive and in *Philadelphia*. And, if any admissions were made, they were made before the justice in the trial of the cause, along with other admissions and things which are not stated.

Which objections were overruled by the court, the evidence admitted, and a bill of exceptions sealed at the plaintiff's request.

The defendant then called *Samuel Redett*, sen., Esq., who stated that this note was put into his hands by *Reichart* for collection. These papers, (receipts,) were produced by the defendant along with the article of agreement. The moneys mentioned in them were admitted by the plaintiff to be a payment on the note in question in favour of the defendant.

The plaintiff's counsel, in the cross-examination, asked the witness to state all that was said by the plaintiff, at the same time and as parts of the same conversation, admitting that the note was to bear interest, and the defendant's willingness to pay it. To which the defendant objected, and requested to read the papers referred to, before the plaintiff's counsel proceeded with the cross-examination of the witness, as above stated. To this the plaintiff objected; but the court allowed it, and sealed another bill of exceptions at the plaintiff's request.

The papers were then read, viz:—

1822, Aug. 6th, Receipt, <i>Worrals</i> and <i>Richardson</i> , for	\$70,00
Sept. 18th, Ditto,	10,00
Sept. 19th, Ditto,	20,28
Nov. 2nd, <i>Samuel Park</i> ,	70,00

The plaintiff renewed the question to the witness before stated. To which the defendant's counsel objected. The court sustained the objection, and rejected the evidence, and sealed another bill of exceptions at the request of the plaintiff.

The plaintiff offered in evidence the article of agreement before offered, and which had been produced before the justice by the defendant along with the papers read. The defendant objected to its admission. The court rejected it, and sealed another bill at the request of the plaintiff's counsel.

Alexander, for the plaintiff in error.—1. The plaintiff claimed the right to appropriate payments already made, to interest. Interest was left out by mistake, and the articles were evidence to reform the note. 8 *Johns*. 149. 1 *Serg & Rawle*, 465. 2 *Johns*. 596. 4 *Johns*. Ch. 148. 2 *Atk*. 203. 2 *Cranch*, 419. 2 *Johns*. Ch. 274. 2 *Dall*. 70. 4 *Cranch*, 320. 9 *Cranch*, 241.

2. We had a right to cross-examine as to the admission. It might have been made with a view to a compromise; in which case, the receipts would not be evidence. The right to appropriate was with the plaintiff. *Hurker v. Conrad*, 13 *Serg. & Rawle*.

Ramsey and *Carothers*.—The article was irrelevant. It had no perceptible connexion with the note. *Phillips's Evid*. 423.

(Reichart v. Beidleman.)

The note cannot be enlarged on evidence. They should have declared on it as they meant to recover on it. *Jordan v. Cooper*, 3 *Serg. & Rawle*, 564. *Clark v. M'Anulty*, 3 *Serg. & Rawle*, 374. *Alexander*, in reply, cited *M'Cutcheon v. Nigh*, 10 *Serg. & Rawle*, 344, as the very counterpart of the case under consideration.

The opinion of the court was delivered by

GIBSON, C. J.—If the interest were omitted by mistake, chancery would no doubt set the matter right; and having no such court, our practice is to consider the instrument as already reformed. But in that view of the case, the plaintiff should have declared on his note according to what may be termed its equitable effect; as in *Jordan v. Cooper*, 3 *Serg. & Rawle*, 564. To avoid the force of this, the plaintiff having gone for the amount of the note as actually drawn, claims the right only to appropriate out of payments already made, sufficient to answer the interest due in equity; and thus to relieve the note as set out in the declaration, from what would otherwise be a direct payment. But that would, in effect, enable him to recover what he had not sued for. He may waive his right to have the mistake corrected, but then it ought to be in good faith and to every intent; for to permit him to sue on a part of his demand, and hold the rest in reserve against partial payments, would enable him to take his antagonist by surprise. The contract of the drawer of a promissory note is entire, and cannot be split up to answer distinct purposes. Where a part has been omitted, the payee may with us declare specially or waive the right of having the error corrected: but he cannot take a middle course; for if he state his cause of action to be one thing, he will be estopped by the record from affirming it to be another. I therefore perceive no error in the rejection of the evidence.

The other point I take to be extremely clear. In the guise of a cross-examination, the plaintiff attempted to introduce a direct examination of the witness to facts which were altogether foreign to the matter of his examination in chief, and which would have been incompetent, coming from the mouths of his own witnesses. It was, therefore, inadmissible.

HUSTON, J.—The plaintiff having read his note, offered in evidence an article of agreement, from which he alleged, it appeared the note ought to have been drawn payable with interest, and this was offered to recover interest. This was rejected on the authority of *Jordan v. Cooper*, 3 *Serg. & Rawle*, 564. This forms the first bill of exceptions.

The second I pass over.

The defendant offered to prove payment of money in *Philadelphia* for the plaintiff's use, and to prove that the plaintiff had, since the payment in *Philadelphia* by the defendant, agreed that the

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sums there paid, should he credited on this note. The witnesses produced the receipts for the payment in *Philadelphia*, and said the plaintiff agreed that these should be credited on this note in question. The plaintiff's counsel asked the witness to state all that was said by the plaintiff at the same time, as a part of the same conversation, and by the defendant, admitting that the note was to bear interest, and the defendant's willingness to pay interest. This was objected to, and the court decided it should not be answered. The matter in issue was small, and I shall be as unwilling to reverse for small matters not affecting the merits, as any person can be: but it seems to me, a principle was overlooked in the hurry of a trial of the utmost consequence. This right to cross-examine is invaluable; without it, trials and courts are not worth having. But, when a witness is called to prove what a party in the cause said, and states a particular sentence, and does not state what preceded or followed, when he states what one party agreed to, but does not, and is not permitted to state, on what condition he so agreed, what was the consideration of the agreement, nor what the other party said and agreed to; the result may probably be, perhaps certainly must be, injustice in every case.

It is said this would let the plaintiff in to prove what the court had just rejected. Be it so. It is no unusual thing that a party offers testimony which is properly rejected. His opponent, however, may introduce something which will make that very evidence, so rejected, strictly legal. It is alleged here, that the defendant first agreed that the interest was payable, and that in consideration of such admission, the plaintiff agreed that payment in *Philadelphia* should be allowed. If so, the whole ought to have been received, or none of it.

Admitting the case of *Jordan v. Cooper*,—and I am not disposed to deny it,—it is a narrow point. It is this: where the day of performance is put directly in issue, you cannot prove performance on another day. This is the point decided: in discussing it much is written and read; but the case does not decide, and no case decides, that every sentence used by a judge in reasoning on any point, is law; the conclusion may be good law.

The case in 10 *Serg. & Rawle*, 344, is since *Jordan v. Cooper*, and does not contradict it: it settles what has long been practised, that when a defendant, under our general plea, gives evidence of something which might bar the plaintiff's recovery, the plaintiff in reply to it, may give evidence to show that it ought not to bar or affect his claim. That case seems fully to govern this, and to decide that though the articles of agreement were not evidence in the first instance, yet they ought to have been received after the defendant's evidence was given.

It does not enable him to receive what is not sued for.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 19, 1827.]

SHERMAN and another *against* KITSMILLER and another,
Administrators of SHERMAN:

IN ERROR.

The declaration in the first count, stated a promise by the defendant's intestate, that in consideration that the plaintiff would live with the intestate till her marriage, he would give her one hundred acres of land: other counts laid the promise to be in consideration of her living with the intestate, and marrying G. S. Plaintiff averred performance. *Held*, that the promises were void for uncertainty.

WRIT of error to the Court of Common Pleas of *Adams* county.
The plaintiffs in error were plaintiffs below.

Case, brought by *George S. Sherman* and *Elizabeth*, his wife, late *Elizabeth Koons*, against *Michael Kitsmiller* and *Joseph Lefever*, administrators *de bonis non*, with the will annexed, of *George Sherman*, deceased, (the executors having been discharged.) The first count of the declaration stated, that the said *George Sherman*, in his lifetime, in consideration that the said *Elizabeth*, then a single woman; and the niece of the wife of the said *George Sherman*, deceased, would live with him the said *George Sherman*, deceased, until her marriage, and during such period keep house for him, he the said *George Sherman*, deceased, undertook and faithfully promised her, the said *Elizabeth*, that he would give to her one hundred acres of land, (thereby meaning and intending that he would give and convey unto the said *Elizabeth*, one hundred acres of land at and upon her marriage, or within a reasonable time thereafter:) and the said *George S. Sherman* and *Elizabeth*, his wife, aver that she the said *Elizabeth*, relying upon the said promise and undertaking of the said *George Sherman*, deceased, and in consideration thereof, did live with him the said *George Sherman*, deceased, and did well and faithfully keep his house for the day and year last aforesaid, until the time of her marriage, to wit, on the first day of *April*, 1816, when she was lawfully married to the said *George S. Sherman*, to wit, at the county aforesaid, of which the said *George Sherman*, deceased, then and there had notice, &c.

Besides these, there were other counts laying the promise to be in consideration that she would marry *George S. Sherman*.

The defendants requested the court to charge the jury,

1. That the promise proved, was too indefinite to be understood: it was of one hundred acres of land, without describing where it lay, of what value it should be, how it was to be laid off, or by whom.
2. The time when the promise was to be performed is uncertain, and might well refer to an intention on the part of *George Sherman*, to devise one hundred acres of land, which would not be sufficient to support an action.

(Sherman and another v. Kitsmiller and another, Administrators of Sherman.)

Upon the above points, the court charged the jury as follows:—

If a promise is so vague in its terms as to be incapable of being understood, it cannot be enforced. A legal promise must mean something distinct and definite, something capable of being understood, and of being carried into effect. If *George Sherman* had in fact, reference to no particular lands, if he did not excite nor intend to excite, a hope or expectation in *Elizabeth Koons*, that upon her marrying *George S. Sherman*, she should get any particular lands, such promise would not be so perfect as to furnish the grounds of an action for damages. But, if *George Sherman* was seised of several tracts in the vicinity, and promised Miss *Koons* a hundred acres of land in such manner as to excite an expectation in her, that it was a portion of his lands so held by him, although not particularly described, or specifying its value, or how to be laid off, or by whom, and, in pursuance of such promise, she did marry *George S. Sherman*, we think this action might be sustained, if the promise or contract was complete.

The plaintiffs excepted to this charge of the court.

Durkee, for the plaintiffs in error:—Such a promise as that laid is good; but the jury would have to assess the damages as they could. It can be no worse than a promise to deliver a horse or a hat, or any specific thing, without mentioning the value. There are many cases where there is no standard of value. He relied on *Barr v. Hill*, *Add.* 376, as a case of such a promise.

Stevens and Carothers, contra.—The promise, both as proved and as laid, is bad: It ought to be certain, or to contain a reference to something certain, so as to give a standard of value. Where the plaintiff goes for the value of the thing promised, and not of the services rendered, the value must appear with reasonable certainty. The case in *Addison*, refers to cases where a specific execution would have been decreed, and the promise must have been certain enough for an action, if it were certain enough for specific execution. No one will suppose it could be specifically enforced here: she ought, in such case, to have demanded the land. They cited 1 *Bac.* 264, *Assumpsit, B.* 1 *Com. Cont.* 84.

The opinion of the court was delivered by

DUNCAN, J.—The declaration contains four counts:—

1. On the special promise to give *Elizabeth Koons* one hundred acres of land, in consideration that she should live with the intestate, as his housekeeper, until her marriage, with an averment that she did live with him, and keep his house until her marriage.

2. That he would give her one hundred acres of land, if she lived with him until her marriage, and married the plaintiff, *George Sherman*, with an averment that she did live with him until she intermarried with *George Sherman*.

3. Is a promise to give her one hundred acres of land, if she

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married *George Sherman*, with an averment that she intermarried with *George Sherman*.

4. Is a *quantum meruit* for work, labour, and services.

The error assigned is, in that part of a long charge in which the court say, "There can be no recovery, unless there was a legal promise, seriously made: if a promise is so vague in its terms as to be incapable of being understood, and of being carried into effect, it cannot be enforced. If *George Sherman* had reference to no particular lands; if he did not excite or intend to excite, a hope or expectation in *Elizabeth Koons*, that after her marriage with *George Sherman* she should get any land, such promise would not be so perfect as to furnish the ground of an action for damages. But if *George Sherman* was seised of several tracts in the vicinity, and he promised her one hundred acres, in such a manner as to excite an expectation in her that it was a particular part of his lands so held by him, though not particularly describing or specifying its value, or by whom; and if, in pursuance of such promise, she did marry *George Sherman*, then the action might be sustained."

Now, let us put the case of the plaintiffs in the most favourable light, without regarding the form of the declaration, and admit that the proof met the allegation, the special promise of the one hundred acres of land, the consideration of the promise, marriage, and its execution, and living with the defendant's intestate until the marriage, the charge of the court was, in the particular complained of, more favourable to the plaintiffs than their case warranted. It should have been, on the question put to the court—that the promise could not support the action; that the defendant's intestate did not assume to convey any certain thing, to convey any certain or particular land, or that could, with reference to any thing said by him, refer to any thing certain. Whereas the court submitted to the jury whether it did refer to any thing certain, viz. lands of the intestate in the vicinity; and that without one spark of evidence to authorize the jury to make such an inference or draw such conclusion. And, if the verdict had been for the plaintiffs, on either of these three counts, the judgment would have been reversed for this error. The jury have found that the promise referred to nothing certain, no particular lands any where of which the promisor was seised. Except the count on the *quantum meruit*, for the reasonable allowance for the services of *Elizabeth Koons*, it was not an action of *indebitatus assumpsit*, but an action on the special contract—an action to recover damages sustained by the plaintiff for the breach of a promise to convey one hundred acres of land, an action for not specifically executing the contract. There can be no implied promise, because, whatever the undertaking was as to the one hundred acres, it was express: the action is brought on the express promise, and that only lies where a man by express words, assumes to do a certain thing. *Com. Dig. title Assumpsit upon an express Promise, A. 3.* Not that this means an absolute

(Sherman and another v. Kitsmiller and another, Administrators of Sherman.) certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for, in *assumpsit* for non-payment of money, it is necessary to reduce the amount to a certainty; or, on a *quantum meruit*, by an averment, where the amount does not otherwise appear. Express promises or contracts ought to be certain and explicit, to a common intent at least. 1 *Com. on Cont.* 3. They may be rendered certain by a reference to something certain; and the cases to be found in the books as to the nature of this reference, are generally on promises on marriage: as, where A., in consideration that B. would marry his daughter, promised to give with her a child's portion; and that, at the time of his death, he would give to her as much as any of his other children, except his eldest son,—this was holden to be a good promise: for, although *a child's portion* is altogether uncertain, yet *what the rest of the children, except the eldest got*, reduces it to a sufficient certainty. *Sylvester's Case*, Popham, 148. 2 *Roll. Rep.* 104. But, if a citizen of *London* promises a child's portion, that of itself is sufficiently certain; for, by the custom there, it is certain how much each child shall have. 2 *Roll. Rep.* 104. 1 *Lev.* 88. Now, here, the court instructed the jury, that if they could find this promise to refer to any thing certain, any land in particular, the action could be maintained. This was leaving it to the jury more favourably for the plaintiffs than ought to have been done; for the jury should have been instructed, that as there was nothing certain in the promise, nothing referred to, to render it certain, the action could not be maintained. The contract was an express one,—nothing could be raised by implication,—no other contract could be implied. By the statute of frauds and perjuries, such a promise would be void, in *England*, not being in writing; and, although that provision is not incorporated in our act on the subject, this would be matter of regret, if such loose speeches should be held to amount to a solemn binding promise, obliging the speaker to convey one hundred acres of his homestead estate, or pay the value in money. If a certain explicit, serious promise was made with her, though not in writing, if marriage was contracted on the faith of it, and the promise was certain of some certain thing, it would be binding. There would, in the present case, be no specific performance decreed in a Court of Chancery: the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give him one hundred pieces of silver, this would be too vague to support an action; for what pieces?—fifty cent pieces or dollars?—what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be, that they should be at least of a middling quality; but one hundred acres of land, without locality, without estimation of value, without relation to any thing which could render it certain, does appear to me to be the most vague of all promises; and, if any contract can be void for its un-

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certainly, this must be. One hundred acres on the *Rocky* mountain, or in the *Conestoga* manor—one hundred acres in the mountain of *Hanover* county, *Virginia*, or in the *Conewango* rich lands of *Adams* county—one hundred acres of *George Sherman's* mansion place at eighty dollars per acre, or one hundred acres of his barren lands at five dollars.

This vague and void promise, incapable of specific execution, because it has nothing specific in it, would not prevent the plaintiffs from recovering in a *quantum meruit* for the value of this young woman's services, until her marriage. If this promise had been, that, in consideration of one hundred pounds, the defendant's testator promised to convey her one hundred acres of land, chancery would not decree a specific performance, or decree a conveyance of any particular land; yet the party could recover back the money he had paid in an action. As, where a young man, at the request of his uncle, lived with him, and his uncle promised to do by him as his own child, and he lived and worked with him above eleven years; and his uncle said his nephew should be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him as a compensation for his services: but died without doing any thing for his nephew, or making him any compensation, it was held that an action on an implied *assumpsit* would lie against the executors for the work and labour performed by the nephew for the testator. *Jackson v. The Executors of Le Grange*, 3 Johns. 199. In *Conrad v. Conrad's Administrators*, 4 Dall. 130, a plantation was bought by the plaintiff, an illegitimate son of the defendant's intestate, on a special agreement that if the plaintiff would live with the intestate, and work his plantation for six years, he would give and convey to him one hundred acres of the land. This was held a good promise, because it was certain—one hundred acres of the plantation on which the father lived. But, in this case, the jury have negatived all idea of an agreement to give Miss *Koons* one hundred acres of any particular kind or quality of land, of any certain description, on which any value could be put. In 2 *Yeates*, 522, in an action on a promise to convey a tract of land in *Northumberland* county to the plaintiff, the promise was in the first instance gratuitous, but the plaintiff had paid the scrivener to draw the conveyance, which was held to be a sufficient consideration for the promise: the action was for damages for not conveying it. No evidence was given of the value of the land. The court stated the difficulty of giving damages for not conveying lands, of the value of which nothing appeared. The plaintiff's counsel admitted the want of evidence of the value of the land was an incurable defect. If the defect of evidence of value would be incurable, the defect of all allegation or proof of any thing by which the value could be regulated, any thing to afford a clue to the jury by which to discover what was intended to be given, any measure of damages, would be fatal. The promise is as boundless as the

(Sherman and another v. Kitsmiller and another, Administrators of Sherman.)
terrestrial globe. The party would lie at the mercy of the jury—there would be the same reason for ten thousand dollars damages as ten cents. The court could not set aside the verdict in any case, either on account of extravagance, or smallness of damages, for there is nothing by which to measure them; but the arbitrary discretion, or the caprice of the jury must decide them, without evidence and without control. It cannot be compared to actions of slander, where the jury have a wide range, and must exercise some latitude,—it is an action on an express promise, which the law says must be to perform something either certain to a common intent, or by a reference to something which can render it certain. In contracts, which can be enforced specifically, or where damages are to be given for their non-performance, there is always a measure of damages: in actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the direction of the jury. If the jury go beyond the standard, the value ascertained by evidence of the thing contracted for, or under its value, the court will set aside the verdict, but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court,—seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in *assumpsit*, *trover*, &c., where there is a measure, and personal torts, as false imprisonment, slander, malicious prosecution, where damages are matter of opinion. To say that nominal damages, at least, ought to be given, is taking for granted the very matter in controversy; for the legal question is, was there an actionable promise?—a promise to do any thing certain, or certain to a common intent, or where, by reference to any thing, it would be rendered certain. The jury have negatived all this.

I am therefore of opinion, that there was no error in the opinion of the court, by which the plaintiffs have been endamaged: that the law was laid down more favourably for them than the evidence warranted.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

M'DOWELL against M'CULLOUGH, Administrator of
CUNNINGHAM.

IN ERROR.

Where more than twenty years had elapsed from the time of payment stipulated in a single bill, and the obligor, when called on for payment, said, if he were allowed a credit on the bill for a sum which appeared credited on a book account, he would pay the balance, *held*, that the court were right in leaving it to the jury to say, whether this acknowledgment did not repel the presumption of payment arising from length of time.

In the Court of Common Pleas of *Franklin* county, to which this writ of error was directed, the plaintiff below, *John M'Cullough*, administrator of *John Cunningham*, deceased, brought this suit against the plaintiff in error and defendant below, *William M'Dowell*, to *August*, term, 1828, on a single bill, executed by the defendant to the intestate, dated the 27th of *May*, 1800, for twenty-seven pounds, payable on the 1st day of *February*, 1801, with interest from *February*, 1800, no part of which had been paid.

The defendant pleaded payment with leave, &c.

On the trial, *John Parkhill*, a witness for the plaintiff, testified, that in the spring of 1823, this note came to his hands. He called on *William M'Dowell*, who said, if we would allow him a credit of fifty dollars, which appeared on the book account, he would pay the balance, as soon as money came to his hands; witness told him we must take the note and book account as it stood. About the beginning of harvest, the witness called on him again; he had the note and book with him. Defendant examined them; he said if we would allow him that credit, he would pay the balance: he objected to the book account; he said, the work was not done sufficiently. Witness was under the impression it was his duty to collect this money, and urged the payment, and proposed to leave the note and book account to three or five men, and abide by what they decided: he said, if we took the law we must abide by the law, and the law was in his favour. In the spring of 1824, he called on *William M'Dowell*, again, his reply was as formerly: if we allowed the credit, he would pay the balance; witness said, he did not wish to add any costs. *M'Cullough* agreed to leave it to men.

The witness did not recollect that he said he paid money for which he was not credited; he mentioned something of his having ordered the fifty dollars to be credited on the note. *Cunningham* died, perhaps, in the spring of 1801. *John M'Cullough*, and *Robert Cunningham* were the administrators of *John Cunningham*; *Robert* lived in *Westmoreland* county; *M'Cullough* lived

(*M'Dowell v. M'Cullough, Administrator of Cunningham.*)

about four miles from *M'Dowell*. *M'Dowell* was a man in good circumstances.

The plaintiff produced the book of accounts of *John Cunningham*, deceased, containing an account against the defendant, and a settlement, dated in 1801, and a credit of fifty dollars entered, on the 27th of *August*, 1805, thereon.

The defendant requested the court to instruct the jury,—

1. That twenty-five years and eleven months having elapsed since the single bill on which this suit was brought, was due, the legal presumption is, that it is paid.

2. That an acknowledgment as well as a demand was necessary to prevent the legal presumption from arising.

3. That the conversations detailed in evidence, if believed by the jury, do not amount to such an acknowledgment by the party as the law requires, to destroy the legal presumption.

4. That an acknowledgment, to be effectual in repelling the legal presumption, must be unconditional, and consistent with a promise to pay, or, at least, unaccompanied with words inconsistent with a promise to pay.

5. That the whole conversation with the defendant is to be taken into view by the jury; as well his allegation of a payment of fifty dollars, as the rest of it.

Charge of the court:—

1st *Point*.—The time here mentioned having elapsed since the single bill on which the suit was brought, was due, the legal presumption is, that it is paid. If no evidence had been produced here, but the single bill, the presumption of payment would have been conclusive on the plea here entered.

2. The court say that an acknowledgment as well as a demand are necessary to prevent the legal presumption from arising. A mere demand would be of no use at all to prevent the presumption of payment.

3. The court will not say that the conversations detailed in evidence, if believed by the jury, do not amount to such acknowledgment by the party as the law requires to destroy the legal presumption. This depends upon weight of evidence, of which the jury are exclusive judges. In the opinion of the court, whose opinion on facts is not binding on the jury, the conversations detailed in evidence do amount to such acknowledgment by defendant, as the law requires to destroy the legal presumption of payment of the single bill.

4. The court say that the acknowledgment, to be effectual in repelling the legal presumption, must be unconditional and consistent with a promise to pay, or, at least, unaccompanied with words inconsistent with a promise to pay, and the law is here correctly supposed. An acknowledgment must not be extended further than the man who makes it extends it. A condition of every acknowledgment forms a part of the acknowledgment. If the de-

(M'Dowell v. M'Cullough, Administrator of Cunningham.)

defendant acknowledged the claim on the note to be just, all but the fifty dollars before paid, then the acknowledgment can be applied only to that part of the claim which exceeded the fifty dollar payment.

5. The court say that the whole of the conversation with the defendant is to be taken into view by the jury, as well his allegation of the payment of fifty dollars as the rest of it. The jury are to judge of the truth of all the evidence. When the defendant's allegations are given in evidence against him, all that was said by him at the time must be given: and all here has been given, and the whole of the defendant's declarations must be taken together. *Parkhill's* evidence, as the court understood it, was not positive or clear, as to the defendant's allegation of his direction to credit the fifty dollars on the single bill. If the defendant did give such directions, then it ought to be credited upon the single bill, and it was a payment of the single bill as far as it went.

The defendant excepted to this charge.

The jury rendered a verdict in favour of the plaintiff for one hundred and eighty-eight dollars, sixty-four cents, and judgment was entered thereon.

Crawford, for the plaintiff in error.

Findlay, contra.

The opinion of the court was delivered by

DUNCAN, J.—The difference between actions on special contracts and specialties as to the operation of time, is well established. In the first, the bar is by positive statutory provision: the statute must be pleaded: *non assumpsit infra sex annos*—Replication, that he did assume within six years. In the latter, there is no positive legal bar, by analogy to the limitation, as to the time of entry upon lands. Where the debt has been due twenty years, this is a presumption of payment. This presumption, like other presumptions, may be removed by proof of acknowledgment of debt, payment of interest, and many other circumstances. The plea is payment, and the presumption is, that the debt, after that lapse of time, has been paid. But, if the obligor acknowledges it has not been paid, the debt is not renewed by any new promise, nor does it require any inference of that kind, but the presumption of payment is removed. In *assumpsit*, the literal, unqualified acknowledgment, it is to be regretted, has taken a case out of the protection of the statute; but if, at the time of the acknowledgment, any thing be said to repel the inference of a promise, this acknowledgment will not take a case out of the statute of limitations—the cause of action arising on the new-implied promise. The evidence given, in this case, to repel the presumption from lapse of time, was that the defendant said, “if the plaintiffs would allow a credit of fifty dollars, which appeared on the book account, he would pay the balance.” This he repeatedly said. Now the book of accounts, to

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which he referred, showed that the fifty dollars had been credited in the account. The court left it to the jury to say whether this acknowledgment did not show that the debt had not been paid—did not repel all presumption of payment. The court, with superabundant caution, say, that if the jury believe the acknowledgment detailed by the witness, that this does amount to such acknowledgment by the defendant as the law requires to destroy the legal presumption of payment; but still instruct them, of its weight they must judge. The court leave the whole to the jury; that is, whether the presumption of payment, from the lapse of time, is not removed by the evidence given by the plaintiff, that the defendant acknowledged that the single bill had not been paid. They likewise left to the jury the credit to be given to his claim for a deduction of fifty dollars, when he made the acknowledgment, when contrasted with the plaintiff's book, in which he had credit for the fifty dollars, on another account. Undoubtedly, the presumption of payment from the mere lapse of time, was repelled by the positive acknowledgment that the debt was not paid. The principal foundation of payment stood till it was contradicted: it was contradicted by the defendant's acknowledgment that the debt was not paid.

The plaintiff in error has failed to substantiate his exceptions to the opinion and charge of the court, and therefore the judgment should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER, 1827.]

DIXON'S Executors *against* CRIST and others.

IN ERROR.

Consentable lines between adjoining owners under settlement or warrant, determine the boundary: but if either party abandon his claim in whole or in part the other may extend his. If he does not, but lies by, the other party or a third person may obtain it.

Practice of the Board of Property, for a short period, to order resurveys where more than ten *per cent.* in addition to the quantity called for, was returned, commented on.

ERROR to the Court of Common Pleas of *Perry* county, where the suit was ejectment between the same parties.

There was no detailed statement of the evidence filed; but the following facts appeared from the charge of the court, to have been in evidence, and are all that are material to the error now assigned therein.

Wallace and *M'Coskry* resided on adjoining tracts before the revolution. *Wallace's* lines were surveyed and marked. *M'Cos-*

(Dixon's Executors v. Crist and others.)

kry held by improvement, and his right was transmitted to *Dixon*. The land in dispute was the north end of the *M'Coskry* tract, and adjoining *Wallace's* line. There was evidence of early disputes between them, and of a consentable line, throwing off from *M'Coskry* the land in question. *Dixon* took out a warrant on the 23d of *March*, 1810, for one hundred and fifty acres, and had a survey made of two hundred and seventeen acres one hundred and forty-six perches, omitting the land in question, on the 1st of *March*, 1811. An order of resurvey was issued on the 17th of *December*, 1811, for the said quantity. In pursuance of this, a survey was made on the 13th of *December*, 1813, of the same land, as containing two hundred and seventeen acres and fifty-four perches. This order calls for "*Andrew Berryhill* on the north:" he owned the *Wallace* tract. This survey was returned on the 10th of *February*, 1815. On the 14th of *August*, 1820, *Dixon* petitioned for a third order, alleging that part of his land was omitted, &c. The order was granted, and a resurvey made on the 15th of *December*, 1820, including the land in question.

The court, after speaking of the consentable line, &c., say to the jury, "The order of resurvey of the 17th of *December*, 1811, has a reference only to the two hundred and seventeen acres surveyed on *Dixon's* warrant, and seems to have been granted for no other purpose than to enable *Dixon* to secure his whole claim as designated in his survey, being two hundred and seventeen acres on a warrant for one hundred and fifty acres. The plaintiff's counsel insist that was an authority to the surveyor to include the land in dispute, and was granted for this purpose: because, he says, if it had only been intended to embrace the two hundred and seventeen acres before surveyed, that survey could have been received upon a warrant of acceptance. This is not the case. The law is, above ten *per cent.* could not be accepted, and the surveyor general, and the Board of Property were bound by the law. Neither they nor the court and jury have the right to authorize the return of two hundred and seventeen acres, upon a warrant for one hundred and fifty acres in 1811. The proper way was the one adopted by the Board of Property, by issuing a warrant of resurvey." To this opinion the plaintiff excepted.

The opinion of the court was delivered by

HUSTON, J.—This was an ejectment brought by *George Dixon*, in his lifetime, for a part of a tract of land in *Juniata* township, *Perry* county. The facts before the court, and material in this case, were, that about 1769 one *M'Coskry* made a settlement near the land in question, and one *Wallace*, also, near him. That before the year 1776, a dispute having arisen between these men as to their respective boundaries, a line was agreed on and marked by consent of both parties; and the lands north of this were to belong to *Wallace*, and south of it to *M'Coskry*. The plaintiff claimed

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under *M'Coskry's* right, which had passed through several hands, before he became the owner. *M'Coskry*, and every subsequent owner before *Dixon*, had recognised this line as the boundary of the tract. *George Dixon* took out a warrant for the land claimed by him, dated the 23d of *March*, 1810, for one hundred and fifty acres; on which a survey was made the 25th of *November*, 1811, of two hundred and seventeen acres one hundred and forty-six perches; which, with his consent, was bounded by the line agreed on as before-mentioned, with *Wallace*, and which survey did not include the land in question.

Before this time, *Peter Hickes*, who had become the owner of *Wallace's* claim, had taken out a warrant and surveyed in a part of the land within *Dixon's* claim, and within his survey of two hundred and seventeen acres one hundred and forty-six perches. *Dixon* entered a *caveat* against *Hickes*; and on a hearing before the Board of Property, a decision was made on the 3d of *December*, 1811, in favour of *Dixon*, to the whole extent of his survey of two hundred and seventeen acres one hundred and forty-six perches; "Provided, however, he shall release the former warrant for the one hundred and fifty acres to the commonwealth, and take a warrant of resurvey for the whole of his claim, which the secretary of the land office is directed to issue as soon as the said *Dixon* executes the said release, and pays the balance of the purchase money and fees of office."

On the 17th of *December*, 1811, a warrant of resurvey, as it was called, issued; which recited the above decree of the Board of Property, "directed to the secretary of the land office, to issue a warrant of resurvey for the above-mentioned quantity of two hundred and seventeen acres one hundred and forty-six perches to the said *George Dixon*, &c. &c., that he had released, &c., paid, &c. These are, therefore, to authorize you to resurvey, at the place aforesaid, the above-mentioned quantity of land, &c. &c." On this a survey was made on the 13th of *December*, 1813, including the lands in question; but it was a tissue of blunders or frauds; it contained more than two hundred and sixty acres, but it purported to contain only two hundred and seventeen acres fifty-four perches. It would seem that *Dixon* did not know that it contained the land in question; for on the 14th of *August*, 1820, he presented a petition to the Board of Property, stating that the said survey left out part of the land claimed by the petitioner, &c. The board granted an order of resurvey, to correct errors exclude interferences according to prayer, provided it did not interfere with the right of the owners of adjoining lands. The survey made on this corresponded in corners and courses with the last, except an immaterial variance: but by correcting the measure, made the quantity two hundred and sixty acres one hundred and twenty-three perches. I now return to the title of the defendant; it would seem he had made a survey on his old improvement which did not ex-

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tend to the consentable line between him and *Dixon*; part of it had been cleared and fenced, but no actual residence on it; he had taken out a warrant in 1776, and procured a survey including the land in question, and some more to which he had no colour of right; but, before *Dixon* had made any claim to the land in question, and before his first petition to the Board of Property, viz. in *March*, 1811, *Hickes* began to build a house on the land in question, which he finished during the summer and autumn, and into which he removed his family in the beginning of the winter, and where he or his tenants have resided, and still reside. The men who settle in our forests are not possessed of Aladdin's lamp; they cannot complete a dwelling in an hour; he, then, who first begins to improve and build on vacant land, is protected by the law, as an actual settler, from the day he begins, as much and as fully as after he has completed and moved into his house, *provided he is proceeding with reasonable and proper diligence to complete his residence.*

How then stand the parties? *Dixon* and those under whom he claims, had, by an agreement, and by a marked line, excluded the land in question from their claim for near half a century; during which time, it had been considered the property of *Hickes*; or those under whom he claimed: by some means it had perhaps been so treated by them, as that it was dropped from their sight, and was for a period, vacant land, subject to be appropriated by the first person who would settle on it. *Hickes* was that first person: his actual claiming a part of it before, and his commencement of a house in *March*, 1811, duly followed up and completed, give him a right to it, at least, from *March*, 1811; which neither *Dixon* nor the Board of Property, could take from him. The Board of Property never attempted to deprive him of it: their order of the 17th of *December*, 1811, was rightly understood by the court below: it was an order to resurvey the two hundred and seventeen acres and one hundred and forty-six perches, included in *Dixon's* first survey, and no other land. Although the land in question was included in the survey, made on that order in 1813, it was included against law and right.

A man who had an improvement, might, if there was so much vacant land, include three hundred acres; but he might take less. If such improver agreed on a line with an adjoining settler or warrant holder, as was common, and no fraud, such line, commonly called consentable lines, limits and determines the right of the parties; but if one party abandons his whole claim, or a part of it, the other may, after it is so abandoned, and while it is derelict, extend his claim, and include it. If he does not do so, but lies by until the other party, or some third person has acquired a legal interest in it, he cannot extend his claim thereafter, and obtain it. The judge was right in stating, that the case was clear with the defendant on the above facts.

But it is insisted that the judge was wrong in another parti-

(Dixon's Executors v. Crist and others.)

cular. During a certain period, the Board of Property of this state undertook, not only to do every thing in the proper manner, but to revise all, or much of what had been done, respecting titles to land, which, for a time, occasioned no little trouble and expense to a part of the land owners. By a regulation of the proprietary in 1767, and by an act of assembly of the 8th of *April*, 1715, section xv. it had been directed that no more than ten *per cent.*, in addition to the quantity called for, should be surveyed and returned on any warrant. It frequently happened, that the surveyor, on calculating a survey, discovered that he had included the quantity called for, and more than ten acres to every hundred acres in addition. Such surveys were, however, often returned under the proprietary, and often under the state, the returns accepted, and lands patented, sold or passed by descent to heirs who divided them. No injury was done, or could be done to the state; for the owner, when he came to patent, must pay for the overplus at the same rate which he had paid for the residue, and also interest thereon from the date of his warrant. It had been frequently decided, that such returns were not invalid, where there was no interference with the rights of third persons; but about the period above-mentioned, the Board of Property, or a majority of them, compelled a person who came to patent a tract so situated, to take out a new warrant for the overplus, or what they called a warrant of resurvey, to include the whole quantity; which latter was granted on releasing the former warrant. This was done by that board in the present case, between the parties, as before stated. The judge not having his attention called to it, the matter being immaterial in this cause, approves of such practice of the board, and this is alleged as error. It is not error in this cause. If a judge were to go into details and explanations on every point incidentally mentioned in every cause, it would only perplex a jury, and produce no good result. It is believed, the above practice of the land office has long since ceased: it did no good, occasioned much trouble and expense, and was erroneous as unsettling estates, and in considering that as essential which was only directory.

In every matter essential to the cause trying, the charge of the judge was strictly correct. The rights of the parties depended on principles long settled, and the justice of which was obvious to every understanding. The Board of Property did not intend to contravene those settled principles; and, if they had intended it, could not have done so with effect; neither a *common order* of *resurvey*, nor their uncommon *warrant* of resurvey, could alter the rights of the parties. The judge states those rights distinctly, and the law arising from the facts, correctly; and even if, which I am satisfied he did not, he had intended to give a deliberate sanction to that practice, it would in no way affect this cause.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1827.]

M'COY and another, Appellants, *against* PORTER and others,
Executors of PORTER'S Appellees.

APPEAL.

A decretal order made by this court in a matter brought up by appeal from the Orphans' Court, when not final in its nature, may be modified or altered by the court at a subsequent term.

APPEAL from the Orphans' Court of *Cumberland* county. *Francis M'Coy* and *James Criswell*, appellants, against *Ann Porter*, *Abraham Adams*, and *Caleb North*, executors of *Robert Porter*, deceased.

The following decree was made in this case at *October* term, 1826, (see 15 *Serg. & Rawle*, 57.) The last decree of the Orphans' Court reversed, and a new account to be stated by the prothonotary of the court, wherein the executors shall be charged jointly with the balance decreed against them on their first settlement, and allowed for all payments of debts due from the deceased, made since that settlement, and all debts due to him, wherewith they had charged themselves, and which have been found to be irrecoverable. But no allowance is to be made for the payment of any legacy, specific or pecuniary; such payments being improper to introduce into an administration account. If either party objects to any item of charge or discharge stated by the prothonotary, it is to be referred to the court, who will decide upon it, before the final decree. The question of interest is reserved for further consideration.

The opinion of the court was delivered by

DUNCAN, J.—On the report of the prothonotary, in pursuance of a former decretal order of this court, stating a new account, *Abraham Adams*, one of the executors, excepts, and prays the court to reconsider the principle on which, in the said decretal order, the prothonotary was directed to charge the executors jointly with the balance in the first settlement.

On argument, the court are of opinion that this proceeding of the last term, not being in its nature a final and definitive sentence and decree, and being so expressed in the order itself, they now consider the matter open for their reconsideration. The parties are at liberty now to adduce the proofs, on the question of joint liability.

It may be proper, to prevent misapprehension, to state the reason for this opinion of the court.

The business of the Orphans' Court is in some degree regulated by the practice in the Court of Chancery: indeed this court is, in many respects, a Court of Chancery. Their proceedings are by petition in the nature of a bill in chancery; the testimony is by de-

(M'Coy et al., Appellants, v. Porter et al., Executors of Porter's Appellees.) position, and their judgment, in many cases, is carried into effect by attachment. And here the very reference to the prothonotary was in conformity to the practice in a Court of Chancery, who was to act as a master in chancery. In no other way could the court delegate the power to the prothonotary.

I do not say that, in all cases, the Orphans' Court, or this court sitting on appeals from their tribunal, have all the discretionary power of a court of equity; but they unquestionably have been in the constant practice of exercising equitable powers.

The proceedings on appeal are *de novo*. The court do not simply reverse or affirm the decree of the Orphans' Court, but modify it, or rather make a new decree, frequently on new testimony, and on new matter, not brought before the Orphans' Court.

The court do not now decide whether they would grant a rehearing on a final decree on proper grounds showing flagrant injustice: that is a question of a very different kind,—it is not now necessary to give an opinion on a question of great difficulty and novelty.

The decree was not final—many matters were reserved to be decided on before the final decree. In no sense could this be called final, when the court say, they will decide upon certain matters before the final decree. A decree to account is an interlocutory decree. 2 *Madd. Ch.* 347. 2 *Atk.* 387. A decree is only considered as final where all the material facts in the cause have been ascertained, so as to enable the court to understand and decide upon the merits. *Travis v. Waters*, 12 *Johns. Rep.* 500, 508. But the case of *Jaques v. The Methodist Episcopal Church*, 17 *Johns.* 559, is directly on the point. A decree is final, where it settles the rights of the parties on the whole merits. The final decree, in that cause, was procured the 15th of *June*, 1818; but there had been a decree of *June* 27th, by which facts were to be ascertained, and the master made a further report in *July*, 1818, and this was necessary before a final report could be made, and all the judges concurred in the opinion of SPENCER, C. J., that all these prior orders were open to be reversed, modified, and altered, by the Chancellor, until he pronounced his final decree in the cause. In 1 *Johns. Ch.* 498, the same doctrine prevailed; and RADCLIFFE, J., says, it may frequently become indispensable to alter or modify the previous proceeding.

Appeals from the Orphans' Court are limited to a very short time—one year: such a decretal order would be open until one year after the final decree of the cause—not one year after the decretal order to account.

[CHAMBERSBURG, OCTOBER 31, 1827.]

IRWIN *against* DUNWOODY and another.

IN ERROR.

Devise by testator to his sons *James* and *David* of all the residue of his estate to them and each of them share and share alike, to them and each of them their heirs and assigns for ever; and in case either or both of his said sons should die without heirs of his body, their share or shares to be equally divided among certain legatees before named: *held*, that *Joseph* and *David* were tenants in common in tail, with a vested remainder on the death of either, without heirs of the body, to the legatees mentioned.

Children merely named in the will as having received their share of the testator's estate, are not entitled, under a devise to "the legatees above named." But *David* is a legatee within such description, and entitled to a share of *Joseph's* half on the death of *Joseph* without issue.

ERROR to the Court of Common Pleas of *Franklin* county, in ejectment brought by *William Irwin*, against *David Dunwoody* and another, for the one undivided half part of one hundred and fifty-seven acres of land, situate in *Peters* township, *Franklin* county, in which the court below rendered judgment in favour of the plaintiff, for one undivided fifth part, by virtue of the devise, and the one seventh of the undivided fifth, as one of the representatives of *John Dunwoody*, deceased. The following case was stated in the court below in nature of a special verdict.

William Dunwoody, late of *Montgomery* township, *Franklin* county, deceased, made his last will and testament, dated the 9th day of *December*, 1794, wherein, among other things, were the following:—

"I give and bequeath to my loving daughter, *Mary Dunwoody*, (now *Mary Beard*,) twenty pounds specie.

"I do give and bequeath to my loving son, *John Dunwoody*, thirty pounds specie, and my bible, exclusive of what he has already received of me.

"I do give and bequeath to my loving son *Adam Dunwoody*, deceased, his son *William*, ten pounds specie, besides what I have heretofore given to my son *Adam*, to be laid out for him in schooling.

"My loving son, *Samuel Dunwoody*, has received his full share of my estate.

"I do give and bequeath to my loving daughter, *Esther Dunwoody*, fifty pounds specie, one third of my horned cattle, a chest of drawers, my gray mare and the saddle, all the bedding and bed furniture, (except one feather bed and furniture to each of my sons; viz. *Joseph* and *David*,) to be at her pleasure; one third of all my books, my cupboard furniture; she living, as usual, on my estate during her pleasure while unmarried, and to have half an acre

(*Irwin v. Dunwoody and another.*)

of flax sowed for her, and one third of all the wool that the sheep has, that is continued on the place yearly and every year while she is entitled to the aforesaid living.

"I do give and bequeath to my loving daughter, *Ann Dunwoody*, (now *Ann Irwin*,) twenty pounds specie.

"I have paid my loving son, *James Dunwoody* his full share of my estate.

"I give and bequeath to my girl, *Sarah O'Farrell*, five pounds in cash, or the value thereof in bedding.

"I do give and bequeath to my loving sons *Joseph* and *David*, all the residue and remainder of my estate, real and personal, of whatsoever kind to me belonging, or in any wise appertaining, to them and to each of them, share and share alike, to them and each of them, their heirs and assigns for ever. It is further my will, that in case either or both of my sons, viz., *Joseph* and *David*, should die without heirs of their body, then and in such case I allow their share or shares to be equally divided amongst all the above legatees, (except *Sarah O'Farrell*.)

"*Joseph* enjoyed the land in dispute in severalty, and he and *David*, having divided the estate devised to them, *Joseph Dunwoody*, the devisee, died without issue of his body, never having been married, on the 24th day of *August*, 1824, in possession of the tract of land in controversy, under and by virtue of the devise in the said will, not having altered, or by any act of his, charged the estate so given him thereby.

"*Mary Beard*, (late *Mary Dunwoody*,) within mentioned, died before the said *Joseph Dunwoody*, viz. about twenty years ago, leaving to survive her eight children, six of whom are now living.

"*John Dunwoody*, within mentioned, is yet living: *William*, within mentioned, (son of *Adam*,) died in his minority, unmarried and leaving a brother, before the death of the said *Joseph*; *Samuel Dunwoody*, within mentioned, is yet living. *Esther Dunwoody*, aforesaid, died in the lifetime of the said *Joseph Dunwoody*, unmarried and without issue, and *Ann Irwin*, (late *Ann Dunwoody*,) and *James Dunwoody*, within named, are yet living, and *David Dunwoody*, the defendant, is the *David Dunwoody*, in the said will mentioned."

The court gave judgment for the plaintiff, for one undivided fifth, in right of his wife *Ann*, and the one undivided seventh of the undivided fifth in right of *Esther*.

The error assigned was, that the judgment of the court below should have been in favour of the plaintiff for the one undivided half part of one hundred and fifty seven acres of land, (according to the statement filed in the cause,) and not for that portion thereof for which the judgment was rendered.

Crawford, for the plaintiff in error.

J. and G. Chambers, contra.

(*Irwin v. Dunwoody and another.*)

The opinion of the court was delivered by

DUNCAN, J.—The plaintiff in error, in the events which have happened, claims the whole of the moiety of the lands of *Joseph*, devised to him by his father, *William Dunwoody*, as being the only person answering the description of legatee, and capable of taking, on the death of *Joseph*. The Court of Common Pleas decided that he was only entitled to one undivided fifth, in right of his wife, the daughter, *Ann Dunwoody*, and the one seventh of the undivided fifth, in right of *Esther*, who died without issue.

By this will, I am of opinion that *Joseph* and *David* took the estate in common in tail, with a vested remainder on the death of either of them without heirs of the body, to the persons designated by the name of legatees. It is not an executory devise in fee, with a devise over on contingencies which might reasonably happen, but an express estate tail. “In case either or both of my said sons *Joseph* and *David*, should die without heirs of their bodies, then I allow their share to be divided among the above legatees.” The legatees were persons living at the death of the testator. It is as if the remainder had been to them *nominatim*.

It is as unnecessary to cite cases, to prove a position so clear as this, as it would be to quote authorities to prove that a devise to a man and his heirs is a fee simple. The question, whom the testator intended by “all the above legatees, (except *Sarah O’Farrell*,)” is one of very great difficulty; and I must confess, if I was left to surmise and question, or wills were to depend on conjectures, I would conjecture that he intended all the persons *above named*—his children and grandchild. But this intention is far from being so plain and manifest as to satisfy the conscience of a judge. The word legatees is not a word of art, nor does it require any technical construction; but it is a designation of persons not by name, but by characters, in which he has placed them by his will. *James* and *David* are named, but not as legatees: on the contrary, he excludes them, by declaring that he had paid them the full share of his estate. They do not answer the description of persons to take the remainder. It is a general rule, (though there may be some exceptions in the case of wills, which do not apply to the present case,) that if an *un-nominated* person takes, he must answer the whole description of the designation by which he is mentioned in the instrument. It would be difficult to maintain that they agree fully with the description of legatees, merely because they are mentioned and excluded from legacy. If the name of one of the children had been omitted, he would not have taken: it is stronger where he is named, but excluded. This construction is fortified by the exception of *Sarah O’Farrell*. If it was the testator’s intention, it is so latent, so merely conjectural, so problematical, that it would be rather making than construing the will, to introduce those by the name of legatees, to whom nothing of his estate was given by the will, and who

(Irwin v. Dunwoody and another.)

were said by the testator to be fully advanced. *David* answers the description of a legatee fully: he has bequeathed to him both real and personal estate, and he is entitled to one sixth part.

On the whole, my mind has settled down to adopt the construction given by the Court of Common Pleas, so far as it goes,—but adding *David* as a legatee entitled to take. I would willingly have caught at any expression, any hint, to have brought in all the persons named, because I conjecture equality was the intention of the testator; but I cannot supply the omission, nor change the universal meaning of the word legatee. I cannot substitute persons above named for legatees above named.

The judgment is therefore reversed, and judgment to be entered for one undivided sixth and one undivided seventh of one undivided sixth.

[CHAMBERSBURG, OCTOBER, 1827.]

BLEAKNEY and another against The FARMERS and MECHANICS' BANK of Greencastle.

IN ERROR.

The act of assembly of the first of *April*, 1822, providing for the closing of the concerns of banking institutions, is constitutional, and operates in respect to actions pending at the time of its enactment.

THIS case was an action of debt on a promissory note brought by the Farmers and Mechanics Bank of *Greencastle*, the plaintiffs below, against *William Bleakney*, drawer, and *John Stover*, endorser; and the principal ground of defence taken, was, that the corporation had forfeited its charter, and therefore the note was void.

The plaintiff filed a statement of a demand founded on a promissory note, dated the 20th of *January*, 1820, drawn by *William Bleakney*, and endorsed by *John Stover*, to the plaintiffs, wherein the said *Bleakney* promised to pay, sixty days after date, to said *Stover* or order, one thousand one hundred and sixty dollars.

The cause was tried on the 19th of *November*, 1825, and the jury found for the plaintiff for one thousand, five hundred and fifty-two dollars, forty-eight cents, and judgment was entered thereon.

The defendants presented the following, among other points, to the court:

1. That by the omission of the plaintiffs to pay to the commonwealth six *per cent.* on their dividend of *November*, 1819, the charter was forfeited, and the said bank dissolved, unlawful, and unincorporated, and every note taken by the said bank after the first Monday of *January*, 1820, was null and void.

(Bleakney and another v. The Farmers and Mechanics' Bank of Greencastle.)

2. The plaintiffs cannot recover in their corporate name, on any note or contract by them, after the 20th of *January*, 1820; and, as the note on which the suit is founded, is after that date, there can be no recovery on the same.

Charge of the Court.—By the omission of the plaintiffs to pay to the commonwealth six *per cent.* on their dividend, of *November*, 1819, the charter of the plaintiffs was forfeited, and the bank dissolved, unlawful, and unincorporated; and every note taken by the said bank after the first Monday of *January*, 1820, was null and void; but the act of assembly of *April* 1st, 1822, entitled, “an act providing for the closing of the concerns of banking institutions,” restores the bank, legalizes the note which was before illegal and void, and makes it as effectual to all intents and purposes, as if the omission of the bank to pay to the commonwealth the six *per cent.* on their dividend had never existed. Therefore the plaintiffs are not precluded by any thing suggested in these two points, from recovering on this note in their corporate name.

To this charge the defendants excepted.

Dunlop, for the plaintiff in error.

Crawford and *M'Cullough*, *contra.*

The opinion of the court was delivered by

DUNCAN, J.—The plaintiffs in error have confined their exceptions to the answer of the court to the two points made by them.

It is objected, 1. That the act is unconstitutional, because it is retrospective and impairs contracts; and, 2. If it was constitutional, still it did not operate on actions pending at the time of its passage.

In a case in principle the same as this, *Hess and others v. Werts*, (4 *Serg. & Rawle*, 356,) it was decided that such legislation was not prohibited. It impaired no contract, but removed an impediment to a contract fairly entered into by the defendant. It is so far retrospective; but every retrospective act is not void. Retrospective laws divesting vested rights—working the destruction of a right previously attached, are contrary to the principles of sound legislation; but every retrospective act is not void. An act making that a crime, which was not one when committed, is retrospective; but there is a great difference between making an unlawful act lawful, and making an innocent act criminal. This law divests no right, but removes an impediment or disability. It renders lawful an act prohibited, as if it had been lawful *ab initio*. It works no injustice—infringes no man's right—it impairs no contract—but takes from the contract the taint which the policy of the law interposed, and gives to the holder of the note a right to recover on the contract—a right which he would have possessed if there had been no legislative interposition. The party is restored to his common law right and common law remedy. In *Ogle v. The Somerset and Mount Pleasant Turnpike Co.* (5 *Serg. & Rawle*, 256,) the constitutionality of the law was not questioned; but the point was, whether the act operated on suits pending.

(Bleakney and another v. The Farmers and Mechanics' Bank of Greencastle.)

The second objection—that the act does not operate on this pending suit—is one which has received the fullest consideration of the court; but if it cannot be distinguished from *Bedford v. Shilling*, and *Ogle v. The Turnpike Company*, we would not be disposed to depart from the principles established in these cases. The case of *Bedford v. Shilling*, was decided on the ground that the word *recover*, might, without violence, be confined to suits commenced after the act, and a subsequent provision showed, decisively, that this was the meaning. In *Ogle's* case, the provision was clearly prospective. “The respective companies shall have the same legal remedy for the recovery of the amount of subscriptions, as if such provision requiring the payment of a certain sum for each share had not been required in the acts aforesaid.” And, by Chief Justice TILGHMAN, who delivered the opinion of the court: “When it is said, that the turnpike companies shall have the same legal remedy as if the repealed acts had never been passed, it is to be understood that the action is to be *in futuro*, by an action commenced after the passing of the law.” But the provision in the act of the 1st of *April*, 1822, providing for the closing of the concerns of banking institutions, is differently expressed. It provides, “that the acts and proceedings heretofore done and performed by the board of directors of such bank subsequent to the forfeiture of its charter, if the said acts and proceedings have been done and performed in the manner, as they might or could have been lawfully done previous to such forfeiture, be and the same are hereby confirmed and declared valid in law, with the same force and effect as if the same acts and proceedings had been done previous to the forfeiture of such charter.” The bringing an action is an act and proceeding; and the act, done after the forfeiture, is legalized, as if there had been no forfeiture of the charter. The bringing an action is an act which they might have lawfully performed, if the charter had not been forfeited; and the act is in language so plain, that it would be affectation or stupidity to misunderstand it; it ratifies the bringing of the action, as if it had been done before the forfeiture, and gives it the same force and effect. It is the very case provided for; and if it did not mean to embrace it, it meant nothing. It is to operate on all the past acts and proceedings of the bank,—all those acts and proceedings theretofore done.

The cases of *Bedford v. Shilling* and *Ogle v. The Turnpike Co.* were decided on the words of the several acts of assembly, where the remedy was prospective; but this act of assembly legalizes the act *done*—all that could have been done, had there been no forfeiture.

The construction of the Court of Common Pleas on the healing nature of the provision of the act of assembly, was the true and legal construction, and the judgment is therefore affirmed.

Judgment affirmed.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT, DECEMBER TERM, 1827.

[PHILADELPHIA, DECEMBER 26, 1827.]

NEAL *against* The COMMONWEALTH.

IN ERROR.

The jurisdiction of the city of *Philadelphia* extends to the *Jersey* shore, subject to the compact between the two states.

WRIT of error to the Mayor's Court of the city of *Philadelphia*.

John Neal was indicted for an assault and battery on *Jabesh Ashmore*, and the jury found a special verdict, that the defendant committed the assault and battery as charged in the indictment, on board of a brig, lying in the river *Delaware*, at the end of the wharf called *Flintham's* wharf; that the said vessel was lying beyond low-water mark opposite to *Philadelphia* county and city, and was by cables attached to the said wharf, which wharf is in the said city.

If the court consider that the said brig was within the city aforesaid, then the jury find the defendant *guilty*; but, if the court consider that the said brig was not in the said city, the jury then say the offence was not committed within the jurisdiction of this court, and that they find him *not guilty*.

On this verdict the Mayor's Court entered judgment against the defendant, by whom this writ of error was taken out.

The question submitted to this court was, whether the offence was committed within the jurisdiction of the Mayor's Court for the city of *Philadelphia*.

Mahany, for the plaintiff in error.

Pettit and *Sykes*, *contra*.

(Neal v. The Commonwealth.)

The opinion of the court was delivered by

GIBSON, C. J.—In the case stated, it is admitted that the plaintiff in error committed the assault of which he is indicted, on board a brig lying beyond low-water mark at *Flintham's* wharf: so that the question depends on whether the jurisdiction of the Mayor's Court extends beyond the margin of the river.

On this little can be said in the way of argument; for nothing in the act of incorporation or the supplementary acts, has a direct bearing on it, or was intended to be predicated of it; and the construction, therefore, is in a great degree to be directed by expediency. The compact between *Pennsylvania* and *Jersey*, which, subject to certain limitations, secures to each a common jurisdiction of offences committed on the *Delaware*, relates exclusively to state jurisdiction, and cannot settle a question of jurisdiction between places in the same state. The incorporating act of 1788, declares, that "the inhabitants of the city of *Philadelphia*, as the same *extends* and *is laid out*, BETWEEN the rivers *Delaware* and *Schuylkill*," shall be constituted a corporation. That the city had been laid out between these rivers, is no doubt, directly affirmed; but how far it *extends*, is left as much in the dark as ever. This act has reference to the charter of *William Penn*, in which nearly the same words are used. But Mr. *Penn* expressly recognises the jurisdiction of the city over the port by authorizing the citizens "to build wharves so far out *into the river* there, as the *mayor, aldermen, and common council* hereinafter mentioned shall see meet." Again:—"The said CITY of *Philadelphia*," is declared to be "a *port* or *harbour* for discharging and unlading of goods and merchandizes out of ships and boats and other vessels; and for lading and shipping them, in or upon such and so many places, quays, and wharves, as by the *mayor, aldermen, and common council of the said city*, shall, from time to time, be thought most expedient for the accommodation and service of the officers of the customs, and management of the king's affairs and preservation of his duties, *as well as of conveniency of TRADE*." Now, exclusive of the inference to be drawn from the words city and port being used as convertible terms, from which it may well be supposed that the port, as now established by congress, was not then considered as a subject of separate jurisdiction; it is evident that *Philadelphia* was then viewed as destined to become what it afterwards was, the commercial emporium of *America*. Is it to be credited then, that a statesman so sagacious as *William Penn* should have intended to put beyond the control of a city, founded almost exclusively for commercial purposes, the very fountain of its commercial prosperity? The regulation of commerce on the land was expressly committed to the authorities of the city; and it is unwarrantable to suppose that the same authorities were thought to be incompetent to provide ordinances for

(Neal v. The Commonwealth.)

the government of vessels lying in the stream. Undoubtedly, the entire subject of commerce, with all its incidents, was committed to those who were most directly and most deeply interested in it; and who would, therefore, be most competent to manage it successfully for the public good. That the subject was so viewed by *William Penn*, would seem to be fairly deducible from his declaration in the charter, that the port or harbour of *Philadelphia* should extend "into all such creeks, rivers, and places within this province, and shall have so many wharves, quays, landing-places, and members belonging thereto, for landing and shipping of goods, as the said *mayor, aldermen, and common council*, for the time being, with the approbation of the chief officer or officers of the king's customs, shall, from time to time, *think fit to appoint*."

Such, then, being the limits assigned to the city by *William Penn*, and recognised by the incorporating act of 1788, where do we find a legislative provision tending to narrow them? The act for dividing the city into wards, is undoubtedly restrained to the land. But that act was passed with a view to a division rather of the inhabitants than the territory, and it would have been strange had its provisions been applied to territory where there were no inhabitants to divide.

But I am governed more by considerations of expediency, if not absolute necessity, than by positive provisions in favour of the jurisdiction. For what beneficial purpose ascribe to the county authorities jurisdiction of the port, the transactions of which are exclusively commercial and inseparably connected with the city? A power to make ordinances for removing obstructions of the navigation and the causes of contagion, is essential, not only to the prosperity, but the existence of the inhabitants. These cannot be supplied by the county authorities; nor, if it were otherwise, would a remedy adequate to the exigency of the occasion be provided by men who have no particular interest in the subject. It would be an unsufferable annoyance and altogether destructive of order and the administration of the laws, if in putting his foot into a lighter, any one might set the ordinances of the city at defiance. And it would be a source of perplexity and endless litigation, if it were permitted to be made a subject of debate whether any transaction had happened within or beyond the point of low-water mark. To cut up all difficulties of this sort by the roots, we pronounce it to be our unanimous opinion, (and, also, to have been that of our late brother, Mr. Justice DUNCAN, whose loss since the argument we have to deplore,) that the jurisdiction of the city authorities extends to the *Jersey* shore, subject, of course, to the limitations contained in the compact between the two states.

TOD, J., took no part in the decision, not having heard the argument.

Judgment affirmed.

[PHILADELPHIA, DECEMBER 26, 1827.]

FRIEDLEY *against* HAMILTON and another.

IN ERROR.

An absolute deed and defeasance, made at the same time, constitute a mortgage: and, if the defeasance is not recorded, it is to be considered as an unrecorded mortgage, and postponed to a judgment creditor of subsequent date, notwithstanding the absolute deed has been duly recorded.

THIS was a writ of error to the Court of Common Pleas of *Montgomery* county; the parties were the same in the court below. The suit was a feigned issue, ordered by the court below, to try who was entitled to a sum of money arising from the sale of *Henry Friedley's*, jr., real estate, in which *Henry Friedley*, sen., was plaintiff, and *Hamilton* and *Wood* were defendants.

The defendants obtained a judgment on the 28th of *July*, 1817, in that court, by an award of arbitrators, against *Henry Friedley*, jr., and claimed the money under the judgment.

The plaintiff claimed the money as follows:—

Henry Friedley, jr., on the 24th of *May*, 1817, executed a deed, conveying the real estate, from which the money in court arose, to his father, *Henry Friedley*, sen., in fee simple, in consideration of six thousand dollars, which was acknowledged and recorded on the 2d of *August*, 1817. On the same day the grantee, *Henry Friedley*, sen., executed and delivered to *Henry Friedley*, jr., a deed of defeasance, setting forth that the conveyance was made to secure the sum of six thousand dollars due to his father, and binding himself to the said *Henry Friedley*, jr., in the penalty of twelve thousand dollars to reconvey on payment thereof, with interest, by a certain day. The amount due upon this defeasance *Henry Friedley*, sen., claimed to take out of court.

The court below charged, that both papers taken together constituted a mortgage; but that, as the defeasance was not recorded, it was an unrecorded mortgage, and had not a preference over *Hamilton* and *Wood's* judgment.

Error was now assigned on this charge, and the cause was argued by *Kittera* and *T. Sergeant*, for the plaintiff in error, and *Rawle*, jr., *contra*.

The opinion of the court was delivered by

GIBSON, C. J.—Deeds, which are parts of the same transaction, constitute but one instrument. The mortgage in this instance, (for such it undoubtedly is,) consisted of an absolute conveyance and a bond with condition to reconvey on payment of six thousand dollars by the grantor. The absolute conveyance has been recorded; but, according to the letter of the act of assembly, the mort-

(Friedley v. Hamilton and another.)

gage, which consists of all its parts, has not: and it remains to be seen whether it be well recorded within the equity of the act.

The sum of the argument in support of the affirmative, is, that as the parties interested were bound to take notice of the absolute conveyance, which was, undoubtedly, well recorded, enough was done to lead to an inquiry into the true nature of the transaction, which is said to be equivalent to full notice. Constructive notice from facts, is a conclusion of law, which can be drawn only from facts actually within the knowledge of the party, and never from those of which he had only constructive notice; else we should have construction on construction, and inference on inference, without beginning or end. In *Simon v. Brown*, (3 *Yeates*, 186,) and *Heister v. Fortner*, (2 *Binn.* 40,) a deed recorded without a proper probate or acknowledgment, was held to be notice of nothing; and I apprehend the effect would have been the same had the person to be affected actually seen the registry. To affect a party with constructive notice, though often a necessary measure on grounds of public policy, is always a harsh one; and for this reason the courts have not dispensed with the most trifling circumstance required by the legislature: as in the cases just cited. The registry of a deed was intended itself to contain all the essential parts of full and complete notice of every fact necessary to be known, instead of barely putting the party on the scent and requiring him to run all round the world after the grantor and the grantee, seeking information as to the true nature of the transaction. The deed recorded, here, was notice of nothing but what it purported to be, and by that the creditor was informed that the land had been conveyed unconditionally. What reason had he to suppose that the fact was otherwise? and, if he had none, what was there to put him on inquiry? But, what if he had inquired of the parties, and they had refused to answer? The recording acts were intended to guard against injury from secret conveyances; and distinct provisions are made for purchasers or mortgagees, and for creditors. In *Heister v. Fortner*, already cited, and in *Rogers v. Gibson*, (4 *Yeates*, 112,) it was held that a judgment creditor is not a purchaser, and so not within the purview of the act of 1775: and this, I presume, because he cannot be prejudiced by ignorance of an absolute conveyance which leaves nothing in the debtor to answer his demand, and it is, therefore, not necessary to his protection that he should have notice of it. But in the case of a defeasible deed he would be apprized of the existence of an interest still in the grantor, which might, by proper diligence, be levied on by an execution; so that the existence of the defeasance is the only thing which it would be beneficial for him to know. For this reason, it is, the legislature provided in the act of 1715, that without recording, "No deed or mortgage, or defeasible deed, in the nature of a mortgage, shall be good or sufficient to convey or pass any free-

(Friedley v. Hamilton and another.)

hold or inheritance," unless such deed be recorded six months from the date: a provision which is not applicable to other conveyances. It would seem the legislature had in view the prevention of the very mischief which is complained of here, by enacting that no conditional conveyance, which is not fully recorded, shall stand in the way of an execution by a creditor, in favour of whom, the estate is to be considered as still in the grantor. It is evident, then, that what is a sufficient registry in the case of a purchaser may be otherwise in the case of a creditor. We will suppose, what may reasonably be suspected in the case before us, that the conveyance is a contrivance to keep creditors at bay, indefinitely, or till the grantor tender a sum actually due which may be inconsiderable in comparison with the value of the property—what beneficial end would there be obtained from inquiring of the parties whether they meditated a fraud? To say that fraud, without the aid of the recording acts, would be sufficient to avoid the deed, is to say nothing. Fraud might exist without a possibility of detecting it; and it is precisely in such cases that the recording acts operate most beneficially by suspending the necessity of proof of actual fraud. Nor is it better to say that the refusal of the parties to declare the truth, in case of being inquired at, would furnish full proof of fraud. The existence of what purports to be an unconditional conveyance is not a reason to suspect the existence of a defeasance or declaration of trust; and this, as I have said, is a good excuse for the want of an inquiry. The registry of defeasible deeds was intended to be for the benefit of both creditors and purchasers; but what benefit a creditor can derive from the registry of part of a mortgage which has a direct tendency to mislead in a point essential to his interest, I am at a loss to conceive. It would be better for him that the absolute part of the conveyance were not recorded, as he would then discover no apparent obstacle to obtaining satisfaction by execution of the land. By a trick of this sort it is evident that the debtor's estate might be effectually covered from his creditors, if a creditor might collude with him without the risk of losing what is actually due.

I do not pretend that the registry, in this case, is insufficient to give the bond and conveyance the effect of a mortgage between the parties, or, perhaps, against a purchaser, (and the decisions of this court have actually gone no further;) but it is different in regard to a creditor, who is entitled to notice, by the registry, of every fact that may effect his interest.

The legislature of *New York* has specially required deeds of defeasance to be registered; from which it may be inferred that experience had shown the practice of registering defeasible deeds as absolute conveyances, to be mischievous. With us, however, such cases fall within the general provisions of the act of 1715; in the letter or spirit of which there is nothing to exclude them. Even

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were the matter open to construction, I would hold an omission to record any part of a mortgage to be fatal.

ROGERS, J., and HUSTON, J., concurred.

TOD, J.—Was the deed to *Henry Friedley*, sen., of the 24th of *May*, 1817, null and void, as against the subsequent judgment of *Hamilton* and *Wood*, solely because, though recorded in due time, the defeasance, which made it a mortgage, was not also recorded? I think not. In my opinion, the act of assembly does not require any such recording, nor the usage of the country, nor the decision of any court, nor the interest of any individual except the mortgagor. He may suffer by his own default in omitting to get his defeasance recorded. No other person can.

If it is not so, then it seems, a mortgagor has nothing to do but withhold his defeasance from the record to defeat his own conveyance. The defeasance belongs to him—it must be delivered to him—it goes into his hands by the very act of completion—and never into the hands of the mortgagee, whose interest is not to preserve but to destroy it.

It will be admitted that our act for recording deeds is not like those *British* statutes which require a register of every contract for the sale of annuities. I believe it was never heard of, that our law was intended to prevent imposition upon the grantor or mortgagor, or to prevent collusion between the grantor and grantee, but solely to prevent imposition upon subsequent mortgagees or purchasers, or creditors, for want of the means of knowing that the former owner had parted with his interest in the land, or some portion of it. Clearly, the record which shows a man to have parted with his *whole* interest, will prevent, as far as recording can prevent, all subsequent deception. It takes away *all* credit arising from the land. *Omne majus continet in se minus.*

It would seem to me that if the court below was right in holding the deed to be void, as against the subsequent judgment, and the mortgagee not entitled even to the amount really due him from the mortgagor out of the purchase money on the sheriff's sale, then, for the sake of consistency, they must also decide that a judgment entered by default or in any other mode, as is every day the case, for a sum larger than the real claim of the plaintiff, is void as against subsequent judgments, and not valid even for the just debt: a notion which I take to be contrary to the practice in every county in the state. On the same principle the most regular mortgage, containing defeasance and all, if for more money than is really due, ought to be void totally: and a judgment creditor or mortgagee who receives one half of his debt without giving credit for it upon the record should forfeit the residue. How then shall we dispose of the cases of *Lyle v. Ducomb*, (5 *Binn.* 585.) *Shirras v. Craig*, (7 *Cra.* 50,) and numberless others. In the last named case the mortgage was for a large sum, but the money was not due, it was

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for advances *to be* made, liabilities *to be* incurred. Besides, the deed misrepresented the transaction. But, says MARSHALL, C. J., "it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favour of a person who has been in fact injured and deceived by the misrepresentation." In *Lyle v. Ducomb*, the mortgage was for nine thousand dollars; but not a penny was due at the time of the execution, nor was it certain that any thing ever would be due. And another point in that case, more precisely applicable to the present, was, that the second endorsement, which was relied upon solely to fix the *quantum* of debt and the terms of redemption, and which gave character to the whole transaction, was not recorded at any time, as appears by the case, certainly not before the adverse lien had attached. Yet Judge YEATES, who dissented from the majority of the court, did not mention the want of recording the defeasance as an objection, nor was it mentioned by the counsel in the argument. And in *Wharf v. Howell*, (5 Binn. 499,) so perfectly unconscious was Chief Justice TILGHMAN of the necessity of recording the separate defeasance of a mortgage, that he says, "if the mortgagee uses common care he will have the defeasance recorded, or keep a copy," evidently implying that to keep a copy is as safe to the mortgagee as to have the entry on the record; and expressly declaring that, in his opinion, to keep a copy is to use common care.

I take the rule to be settled that a deed for land, absolute and unconditional on its face, if intended to be merely a pledge for the payment of money and redeemable, may be shown to be so by circumstances and by parol proof. For this it will be sufficient to cite *Wharf v. Howell*, (5 Binn. 499.) *Dabney et al. v. Greene*, (4 Hen. & Mun. 101.) *Prec. Ch.* 526. 2 *Atk.* 98. 3 *Atk.* 388. *Pow. on Mort.* 200, 201. 2 *Hayw.* 26. Now, if we say that old *Friedley* is not entitled to take out of court the money which he can show to be fairly due to him upon the mortgage, we must, as it appears to me, either disregard all the above authorities, or, we must decide that a mortgage, having its defeasance in writing separate and unrecorded, is absolutely nothing against a subsequent incumbrance, while the same paper, had its defeasance been by parol only, would be good and conclusive: that is, if I understand the matter, we should establish a rule making a difference between the two cases without any conceivable reason for it: a rule which may be evaded by the parties by the easy contrivance of having a verbal instead of a written clause of redemption.

The only semblance of direct authority, cited for the defendant in error, was *Dunham v. Day*, (2 Johns. Ch. Rep. 188.) That decision has been reversed on this very point in the court of error. 15 *Johns.* 555. Besides, the case of *Dunham v. Day*, was put by the chancellor on the words of their statute, which differs from our law. So, in *Massachusetts*, by an act of 1802—"No convey-

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ance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, *or instrument of defeasance*, unless they are registered." *Kelleran v. Brown*, (4 Mass. 445.) Now, we have no such statute in *Pennsylvania*, and the very fact of their existence in *New York* and *Massachusetts*, shows that without them the law in those states would have been otherwise.

I admit that in a conveyance between father and son, an unrecorded defeasance may be a suspicious thing. So there might be just ground of suspicion, if no defeasance at all. In either case fraud is inquirable into by the jury. The question should have been left to them. Even if fraud was apparent, (of which, by the way, there is no evidence on this record,) I would still think the court below was in an error, to obviate a fraud in a particular case, by attempting an amendment of the law by an *ex post facto* decision.

Judgment affirmed.

[PHILADELPHIA, DECEMBER, 26, 1827.]

COATES *against* WALLACE.

IN ERROR.

Notice to a justice of the peace of the cause of action, in a suit for the penalty of fifty dollars, for taking more than the legal fees, need not specify what fees he was entitled to receive.

Where a justice of the peace binds over a defendant and his surety, he can only charge a fee for one recognisance. The same rule applies to a prosecutor and his witnesses.

No more than twelve cents and a half can be charged by a magistrate as a fee for settling an assault and battery.

A justice of the peace incurs the penalty of the act by demanding and receiving illegal fees, though it is done by mistake or ignorance and without any corrupt intent.

ERROR to the Court of Common Pleas of *Philadelphia* county.

This was an action of debt by *Samuel Wallace*, brought against *Thomas Coates, jr. Esq.*, a justice of the peace of *Philadelphia* county, to recover the penalty of fifty dollars, given by the 26th section of the act of assembly of the 28th of *March*, 1814, for taking illegal fees. *Samuel Wallace*, the plaintiff below, was bound in a recognisance by the justice, after a hearing before him on the 31st of *January*, 1825, to appear at the next Court of Quarter Sessions, for an assault and battery on one *Whetstone*. The surety or bail of *Wallace*, was also bound at the same time, to answer for his appearance, and the prosecutor *Whetstone*, and a witness for the prosecution, were likewise bound to appear to prosecute and testify.

On the docket of the magistrate, the entry of the recognisances was as follows:—

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"*Samuel Wallace*, tent. in \$200.

"*John Fraser*, tent. in \$200, for appearance of defendant.

"*Abraham Whetstone*, tent. in \$50, to testify.

"*Frederick Stock*, tent. in \$50, to do."

The prosecutor and *Wallace*, subsequently agreed to *discontinue* or *settle* the suit, before it was returned by the magistrate to court, and that *Wallace* should pay all the costs. The justice charged two dollars and fifty-eight cents costs, which were paid by *Wallace*, and which he alleged were illegal. It was to recover the penalty for taking these costs that this suit was brought.

Thirty days before the commencement of the suit, (which was originally instituted before a justice of the peace,) the following notice was served on *Coates*:

"To *Thomas Coates*, jr. Esq. one of the justices of the peace of *Philadelphia* county:

"SIR,

"According to the provisions of the act of assembly, I hereby give you notice that I shall, as the attorney of *Samuel Wallace*, commence an action of debt against you at the expiration of thirty days from this time. The cause of action which the said party has or claims against you, is as follows: The said *Samuel Wallace* being bound over to keep the peace before you as a justice of the peace, by ——— *Whetstone*, in the name of the commonwealth of *Pennsylvania*, you received upon the settlement of the case between the parties, from the said *Samuel Wallace*, illegal fees, to wit, the sum of two dollars and eighteen cents, which with forty cents previously paid by the said *Samuel Wallace*, in the said suit, amounted in the whole to two dollars and fifty-eight cents: which said costs or fees of two dollars and eighteen cents and forty cents, are illegal and exceed the amount of fees which aldermen and justices of the peace are permitted to receive by the act of assembly, of the 22nd of *February*, 1821; whereby you have forfeited to the said *Samuel Wallace*, the party injured, the sum of fifty dollars, according to the twenty-sixth section of the act of assembly of the 28th of *March*, 1814, and which said section is re-enacted by the act of assembly of the 22nd of *February*, 1821, and is as follows:—

"Sect. 26th. And be it further enacted by the authority aforesaid, that if any officer whatsoever, shall take greater or other fees than is herein-before expressed and limited, for any service to be done by him after the first day of *September*, next, in his office, or if any officer shall charge or demand, and take any of the fees herein-before ascertained, where the business for which such fees are chargeable shall not have been actually done and performed, or if any officer shall charge or demand any fee for any service or services other than those expressly provided for by this act, such officer shall forfeit and pay to the party injured, fifty dollars, to be re-

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covered as debts of the same amount, are recoverable; and if the judges of any court within this commonwealth shall allow any officer, under any pretence whatsoever, any fees under the denomination of compensatory fees for any services not specified in this act or some other act of assembly, it shall be considered a misdemeanor in office.

Your obedient servant,

“February 21st, 1825.

ISAAC NORRIS.”

The notice was endorsed:

“Notice to *Thomas Coates, jr., Esq.*—*Isaac Norris*, attorney for *Samuel Wallace*: place of abode, Chesnut Street, north side, first door above Tenth Street. Office No. 55 south Seventh Street, second door below George Street, *Philadelphia.*”

On the trial of the cause below, the court declared that the notice was sufficient, which was excepted to by the defendant's counsel.

The defendant's counsel then requested the court below to charge the jury on the following points:

1. That *Coates*, the defendant below, was entitled in the action before him, as a justice of the peace, to *four* fees, of twenty cents each, for *four recognisances*; viz. *one* for the prosecutor, *Whetstone*—*one* for *Stock*, the witness for the prosecution—*one* for *Wallace*, the defendant before *Coates*, and *one* for *Fraser*, the surety or bail of *Wallace*, for his appearance at the next court.

2. That *Coates* was entitled in the action before him, to a fee of *twenty-five cents*, by the act of assembly of the 17th of *March*, 1806, sec. 1, for *discontinuing* and *settling* the assault and battery suit, by consent of the parties, although no agreement was signed in the docket of the justice by the parties or either of them.

2. That *Coates* was not liable to the penalty for taking illegal fees in the action before him, because he took them through *mistake* or *inadvertence*, or *misconception*, of the fee bill, and in the absence of a wilful and *corrupt intent*.

4. That *Coates* was not liable to the said penalty of fifty dollars, inasmuch as the fees were paid to him by an *agreement* of the parties for a settlement or discontinuance of the suit before him.

The court below charged the jury as follows:—

1. That as the hearing of the parties and witness, and the binding over before the justice took place at one and the same time, *Coates* was only entitled at most to *two fees* of twenty cents each, for *two recognisances*; viz. one fee of twenty cents for one recognisance of the prosecutor and his witness or witnesses, and one fee of twenty cents for one recognisance of the defendant before him and his surety or bail.

2. That the act of assembly of the 17th of *March*, 1806, was repealed so far as respects the fee receivable on the settlement of an assault and battery suit, by the fee bill act of the 22nd of *February*, 1821, and that the justice consequently was only entitled

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to twelve and a half cents, being the fee "*for entering discontinuance in a case of assault and battery*," given by the fee bill act last mentioned.

3. That in a *civil* action for the penalty, the justice was liable, whether he took the excess of fees through mistake, or inadvertence, or misconception, of the fee bill, or whether he took them wilfully and corruptly.

4. That it was immaterial whether the fees were paid by an agreement of the parties for a settlement or discontinuance of the suit or not; as such an agreement of the parties for a compromise, could only mean an agreement to pay the *legal fees* to the magistrate.

Fowle and *Mahany*, for the plaintiff in error, contended, that the notice was insufficient, as it did not specify what amount of fees the justice should have taken, and this should have been explicitly specified, as it was the *cause of action*; and the justice could have tendered the excess of fees, as amends. Its omission prevented him from doing so. *Purd. Dig. tit. Justice of the Peace*. According to this notice, *Coates* was entitled to no fees at all, as it says, *the whole* are illegal. The transcript of the justice sets out the items, and it is admitted, that he is entitled to some of them. A notice should specify the *wrong* done by the officer—here the wrong complained of is the taking the *excess* of the legal amount of fees. Of this wrong, the justice has no notice. It is, therefore defective. *Mitchell v. Cowgill*, 4 Binn. 25. *Little v. Toland*, 6 Binn. 85. *Slocum v. Perkins*, 3 Serg. & Rawle, 295. *Prior v. Craig*, 5 Serg. & Rawle, 46. *Jones v. Hughes*, 5 Serg. & Rawle, 299. *Lake v. Shaw*, 5 Serg. & Rawle, 518.

1. On the first point, they said, that the *practice* of magistrates is universal, to take a recognisance for each person. (Judge ROGERS here remarked, that there was a very general belief, that magistrates were in the practice of taking much greater fees than the law allows them.) If the services are performed at different times, as where there are several postponements, is the justice only entitled to the fees for two recognisances? The services may be rendered at different times, as if the case is postponed, a recognisance must be taken for the reappearance of the parties and witnesses, as they would not be bound to attend. Suppose an action brought on a forfeited recognisance against a witness or a party for not appearing, he could plead that it was a *joint* recognisance, and thus defeat the suit, if the opposite doctrine prevails. They cited 4 *Black. Com.* 262. *Fee Bill Acts of 1795, 1814 and 1821*, and *The Commonwealth v. Emery*, 2 Binn. 431.

2. The act of 1806, giving twenty-five cents for settling an assault and battery suit, is not repealed. The act of 1821 gives twelve and a half cents for entering *discontinuance*. Now a *discontinuance* is the act of *one* party, but a *settlement* is the act of *both*. When the justice acts as a mediator, and gives his advice,

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and the parties agree to dismiss the suit, it is a *settlement*, and he is entitled to a larger fee than when *one* party only comes and *discontinues* it of his own accord. 3 *Black. Com.* 296. *Jacob's Law Dict. tit. Discontinuance (of Process.)*

3. The counsel for the plaintiff in error, on this point, merely referred to *Respublica v. Hannum*, 1 *Yeates*, 71. *Rex v. Young*, 1 *Burrows*, 561. *The King v. Borron*, 3 *Barn. & Ald.* 432.

4. They did not argue the fourth point.

I. Norris and *Norris* for the defendant in error.

The notice is sufficient and precise. The act requires notice to be given, that the justice may know the cause of complaint, may reflect on it, and may have an opportunity of tendering amends. Under this notice, he has all these. To inform him of the items in which there is an overcharge, would not benefit him, as the *cause of action*, taking illegal fees, could not be more clearly and explicitly stated. Besides, an aggregate sum was demanded, and it would be impossible for the party to ascertain how the justice would apportion it. In many cases, it is impossible for the party to know on what items the excess of fees is charged. The magistrate is a public officer, and the law presumes, that he knows the fee bill; he is bound by law to have it hung up in his office. We are not bound to tax it for him. He takes his fees at his peril. The *aggregate* amount of fees paid, exceeds the aggregate that he should have received; and therefore, the aggregate amount received is illegal. The legality or illegality of the aggregate is the very gist of the action. *Substantial* notice of every thing is given to him. The fee bill consists of an infinite number of items, and if the law requires a notice that shall specify each, which is legal and which is not, and how much is the excess; it will be almost impossible to draught one. It would be a judicial repeal of the salutary provisions of the act. They cited 4 *Binn.* 25. 6 *Binn.* 87. 2 *Serg. & Rawle*, 235. 5 *Serg. & Rawle*, 46, 299, 518. *Bates v. Shaw*, 13 *Serg. & Rawle*, 493. *Miller v. Smith*, 12 *Serg. & Rawle*, 147,—where the court say they will not construe the statute requiring notice with so much strictness and technicality, as to defeat these actions. *Substantial* notice of the cause of action is only necessary.

1. The *practice* to charge a fee for a recognisance for every person before the magistrate, is a vicious one, and one *sub silentio*. Two recognisances for all parties, and witnesses, will answer as well as one for each. The language of the act, "*taking recognisance in any criminal case, and returning the same to court*," is not to be construed to impose a heavy burden on a party, merely to enrich the magistrate's pocket. If there were fifteen or twenty witnesses, as frequently happens, the expense would be enormous, without any benefit to the party, and that too, where, in point of fact, the magistrate only *nominally* performs the services. *The Commonwealth v. Emery*, 2 *Binn.* 434. They

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referred to the analogous cases of the attorney general being required to indict all parties concerned *jointly*; and where a number of persons are charged in the indictment, the costs are to be taxed as if one person only was indicted, to diminish costs: to ejectment cases, where persons are in possession, not named in the writ, and the sheriff is bound to return, and the prothonotary to enter them as defendants; to cases settled with leave of the court *before* bill found, the fee of the attorney general is less than after—to subpœnas, where all names must be put in one—in all these cases, the legislature has clearly shown the spirit of construction that should govern this court—that an officer is not necessarily to multiply his official services, for the sole purpose of augmenting his costs. *Irwin v. Commissioners*, 1 *Serg. & Rawle*, 506, 7. *Ramsey v. Alexander*, 5 *Serg. & Rawle*, 348.

2. They referred to *Pray v. Bussier*, 7 *Serg. & Rawle*, 447. *Prior v. Craig*, 5 *Serg. & Rawle*, 44. and *The Commonwealth v. Evans*, 13 *Serg. & Rawle*, 449, without argument.

The opinion of the court was delivered by

GIBSON, C. J.—It is objected, that the items on which it is supposed there has been an overcharge, ought to have been specified in the notice. This would require more to be done by the injured party, than might be in his power. He has paid a gross sum, and may not have known how the justice intended to apportion it to the services. He might, it is true, have demanded a bill of costs, which would have shown the particular charges; but the justice might have refused it, and we are not to take for granted, that he would certainly have done his duty in this particular, for the very action is founded on the supposition of his being a wrongdoer. But waving all this, the notice is specific enough for every purpose of convenience, and the legislature never intended to require more. The justice was apprized of the sum, and the occasion on which it is alleged to have been extorted; and this is sufficient to enable him to judge of the extent of the injury, and the propriety of tendering amends. All beyond this, lay more in the knowledge of the justice, than any one else: and to exact more, would involve the injured party in a labyrinth of subtleties, which the legislature never intended to encourage.

The justice claims a right to charge the costs of a separate recognisance for each person bound, whether all might have been included in one recognisance or not. There is no provision in the act of assembly particularly applicable to this part of the case; but analogous instances are not wanting, in which the legislature has evinced a general repugnance to the multiplying of official services, for the purpose of enhancing the costs.

It has thought proper to require a party to include the names of all his witnesses in one subpœna; and where a number are accused of one offence, the Attorney General is required to indict

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them jointly. There may be other instances which do not at present occur to me. Now in a matter which is altogether open to construction, we are to be governed implicitly by the spirit of legislation, evinced in parallel cases; and the more so, where this spirit has a decisively salutary tendency. Nothing is more liable to abuse than the right which the law gives to compensation for official services, and nothing requires to be more strictly guarded. To allow compensation for services which cost no trouble, having been rendered only theoretically, would be palpably unjust. The item of twenty-five cents for compromising the assault and battery, is manifestly wrong, the act of 1822 having reduced the former allowance to twelve and a half cents.

The penalty imposed by this act may be incurred by exacting fees, which are supposed at the time to be legally demandable. By the very words of the prohibitory clause, the *taking* is the gist of the offence. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention to clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril, and we are of opinion, that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids.

TOD, J.—I concur with the Chief Justice most fully, for the reasons he has given, on all the points except one; that of the recognisances.

It was of the strictest and severest law to hold that *Coates*, the justice, was liable to the penalty, for a mistake in supposing that the fee of twenty-five cents, given by the act of the 17th of *March*, 1806, was not taken away afterwards by an implied repeal only. Nevertheless, it was law.

But when the court below charged the jury that the justice was entitled to but one fee of twenty cents for one recognisance of the defendant and his surety, and one fee of twenty cents for one recognisance of the prosecutor and his witness: that is, that the justice had no authority to take separate recognisances from the defendant and his bail, and charge for each, or separate recognisances from the prosecutor and his witnesses, and charge for each, there the court, in my opinion, was manifestly wrong. The fee bill gives to the justice for "taking recognisance in any criminal case, and returning the same to court, twenty cents." The

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charge to the jury on this point was, "that as the hearing of the parties and witness, and the binding over before the justice took place at one and the same time, the defendant, *Coates*, was only entitled, at most, to two fees of twenty cents for two recognisances, viz. one fee of twenty cents for one recognisance, of the prosecutor and his witness or witnesses, and one fee of twenty cents for one recognisance of the defendant, before him and his surety or bail." Now, I take it, this is not the law: it is a great mistake, that the prosecutor and all the witnesses are to be bound over in spite of them, for the appearance of all at court; for this must be the inevitable effect of a joint recognisance. As to binding the principal jointly with his bail, such may have been the practice of some magistrates, but I am not aware of it. I have taken some pains to effect a search among the records of one of the courts in this city, and am informed, no trace can be found of a joint suit in such case. In those parts of the country where I have had an opportunity of seeing the practice, the suits have been invariably separate, which, it is believed, never could be upon a joint recognisance. Nor have I been able to find any precedent of any such joint recognisance in the books of forms. A practice of taking such joint recognisance in criminal cases, might be very inconvenient. To say nothing of the event of the death of the bail, who is usually the only person relied on, suppose the principal to be a man of substance, and after forfeiture, to die; would not the whole burden be thrown off his estate, and survive against the surety? The charge being in this part erroneous, in my apprehension, I am for reversing the judgment.

Judgment affirmed.

[PHILADELPHIA, DECEMBER 26, 1827.]

RUSH *against* FLICKWIRE.

IN ERROR.

In replevin by R.; the defendant avowed the taking in a house occupied by N., for rent due by N. to the defendant: the plaintiff replied no rent in arrear. *Held*, that N. was not a witness for the plaintiff, being liable to the plaintiff for the costs of suit in addition to the amount of rent recovered.

WRIT of error to the District Court for the city and county of *Philadelphia*.

Replevin by *Mary Rush*, the plaintiff below and plaintiff in error, to try the validity of a distress made by the defendant for rent alleged to be due to the defendant, from a certain *John Nesbit*, not a party to the suit. The defendant avowed the taking on the premises occupied by *Nesbit*, for rent in arrear from *Nesbit*: the plain-

(Rush v. Flickwire.)

tiff replied no rent in arrear; and, on the trial, *Nesbit* was offered by the plaintiff as a witness and rejected, and exception taken. The plaintiff then offered to read in evidence the deposition of *Nesbit*, taken on a commission issued to the city of *Lancaster*, by consent of parties, and given in evidence by the plaintiff, with the consent of the defendant, on the argument of a rule to show cause why a new trial should not be granted in this case. The deposition was objected to by the defendant, and rejected by the court, who sealed another bill of exceptions.

The plaintiff assigned as errors,

1. That *John Nesbit* was a competent witness.
2. That his examination on the commission was evidence.

Randall, for the plaintiff in error.

T. Sergeant, contra.

The opinion of the court was delivered by

GIBSON, C. J.—The witness would undoubtedly be liable to the plaintiff in the event of the proceeds of her goods being applied to the payment of the rent; or, in the alternative of the contrary event, he would remain liable to the landlord on his covenant. So far his interest was balanced. But, in favour of the plaintiff, he would be exposed to an additional demand for the costs incurred; so that in this respect it would be less expensive for him to be reached directly than circuitously. It is, however, said, the replication of no rent in arrear was intended for the plaintiff's own benefit, on the supposition that the landlord was a wrong-doer: consequently that the issue involved an inquiry with which the witness had no concern; so that he could in no event be burdened with the costs. But the foundation of the argument fails. The tenant is bound to defend the rights of one whose property has been distrained only in consequence of his having been his guest; and where he refuses to do so, the owner defends on the tenant's responsibility. And he is bound to contest every inch of the ground, for a voluntary payment would be at his own risk, and bad if there were no rent in arrear. The defence was not only necessary to the plaintiff's safety; but it was manifestly the interest of the witness to put the landlord to proof of the facts set forth in the avowry; and, as the witness would eventually be liable for the costs, he had a certain and a direct interest in preventing a recovery.

Judgment affirmed.

[PHILADELPHIA, DECEMBER 26, 1827.]

BERRY *against* M'MULLEN.

IN ERROR.

One who owns the equitable interest in land, who is in the constructive possession and may receive the income of it, is liable in covenant as assignee for a ground rent charged thereon, although the legal title is in another, and no trust appears by deed.

WRIT of error to the Court of Common Pleas of the county of *Philadelphia*.

Covenant, by the plaintiff, *Peter L. Berry*, against the defendant, *Joseph M'Mullen*, to recover the sum of thirty dollars, being a half year's ground rent, due the 18th of *April*, 1821, issuing out of a lot of ground situate at the corner of Chesnut and Juniper Streets, in the city of *Philadelphia*. The evidence on both sides consisted of different conveyances of the lot and the ground rents issuing out of it, together with admissions by the parties, of certain facts.

On the 18th day of *April*, 1812, the lot on Chesnut and Juniper Streets, being then owned by *Edward Burd* and *Edward Shippen Burd*, was conveyed to *Robert Mercer* and *Joseph M'Mullen*, their heirs and assigns, by Messrs. *Burd*, reserving a ground rent, payable to them, of one hundred and twenty dollars per annum, payable half yearly on the 18th day of the months of *April* and *October*, in each and every year, which *Mercer* and *M'Mullen*, by express covenant, contracted to pay. On the 22nd of *April*, 1817, *Joseph M'Mullen* and wife, released all the moiety of *M'Mullen* in the land, to *Robert Mercer*, his co-grantee, subject to the payment of the rents and the performance of the covenants in the deed from the Messrs. *Burd* to them. By this operation, *Robert Mercer* became the sole proprietor of the lot. On the 22nd day of *December*, 1818, *Robert Mercer* and wife, conveyed the lot to *Berry*, the plaintiff, in consideration of one dollar paid, and of the performance of the covenants of the indenture, among which was an express covenant by *Berry*, to pay the paramount ground rent to the Messrs. *Burds*, and an additional ground rent of sixty dollars per annum to the said *Robert Mercer*, his heirs and assigns for ever. On the 25th day of *August*, 1819, *Robert Mercer*, being in failing and insolvent circumstances, assigned, among other things, his interest in the ground rent, reserved from the lot by his deed to *Berry*, of the 25th of *December*, 1818, to *Joseph M'Mullen* and *Michael Nesbit*, in trust for his creditors. On the 20th of *November*, 1820, *Joseph M'Mullen*, the defendant, and *Michael Nesbit*, assignees of *Robert Mercer*, for the consideration of ten dollars, conveyed the ground rent of sixty dollars per annum, to *Jane Berry*, a daughter of the plaintiff. Miss *Berry*, subsequently, and be-

(Berry v. M'Mullen.)

fore the bringing of this suit, died intestate, and without issue; and by the intestate laws of this commonwealth, this ground rent, so owned by her, accrued to her father, *Peter L. Berry*, the plaintiff. Sometime in 1820, the precise time not being stated, the lot itself was levied upon at the suit of a creditor of Mr. *Berry*, and sold by the sheriff by virtue of a writ of *venditioni exponas*, at public sale, for forty-five dollars. At the sale Mr. *M'Mullen*, the defendant, bid for the property, and, on its being struck off to him, signed the usual conditions of sale, the name of no other person being then mentioned by him as interested in the purchase.

A few days afterwards he came to the sheriff's office with Mr. *George Mercer*, and requested the sheriff to make the deed to him, Mr. *George Mercer*. The latter gentleman paid the purchase money, and on the 1st of *November*, 1820, received a deed for the lot from the sheriff, subject to the two ground rents of one hundred and twenty dollars and sixty dollars per annum. From receipts produced upon notice, by the defendant, it appeared that he had, during the years 1823 and 1824, paid the paramount or larger ground rent of one hundred and twenty dollars, to Mrs. *M'Pherson*, who had derived title to it through the *Burds*. Upon the lot there was a partial erection of a building, which was in a dilapidated condition, having been abandoned for some time.

The plaintiff contended,

1. That in point of fact, *M'Mullen* was the real purchaser of the lot at the sheriff's sale—that *George Mercer* was a mere trustee for him—that he was the *cestuy que trust*, the person beneficially interested in the purchase.

2. That these facts being established, it is competent for Mr. *Berry*, the plaintiff, to maintain this action of covenant against *M'Mullen* for the privity of estate, the plaintiff being the owner of the ground rent, and the defendant the owner of the soil.

Charge of the Court.—The question of fact, whether *George Mercer* was a mere trustee for the defendant, is a matter for your peculiar and exclusive cognizance, and the court are not disposed to entrench upon your duties by pressing any positive opinion upon you they may have formed, as to how far the evidence supports this position of the plaintiff. The able advocate of the plaintiff supposes that the facts of the defendant having bid at the sale, and signed the conditions, and paid the paramount ground rent to Mrs. *M'Pherson*, the proprietor, are conclusive as to his being the real owner of the land, and of Mr. *George Mercer* being, in his language, “a man of straw.” This, however, does not appear so very clear to the court. These acts are of a very equivocal character. In practice, it is very common for one man either to bid for another, or to substitute another person as purchaser by subsequent arrangements. The fact, as the payment of the paramount ground rent by Mr. *M'Mullen*, is more so. He was one of the original grantees of the lot, to whom the

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Burds conveyed it, and was bound by his express covenant, to pay the rent to the *Burds*, or their assigns, in whosoever hands the land might be. These facts, however, are not without weight, and, if they, in any respect, go to establish that *Mercer* was a mere trustee of *M'Mullen*, and you are the only judges of this part of the case, then the other question made by the plaintiff's counsel arises, and upon which the court are called upon to express an opinion by both of the parties.

Without saying whether a *cestuy que trust*, a person for whose use real estate was held nominally by a trustee who was in possession of it, and in the permanency and enjoyment of its issues and profits, and where the trust appeared by deed, or other unequivocal evidence would or would not be liable for rent in such a case as this, and, in this form of action, the court are of opinion, that in the case before them, the plaintiff cannot recover on this ground. It is true, as the plaintiff's counsel has contended, that in *Pennsylvania* the courts of common law, from the necessity of the case, exercise equitable powers, and that recoveries upon equitable principles are had in other courts, which could not be attempted with any hope of success in the country from which we draw our system of jurisprudence. But the learned counsel has not shown a case in which the extraordinary powers of a court of equity have been employed to enforce such a recovery as this, depending as it does upon strict legal principle, operating in most instances, and in this particularly so, with great severity. It is clear law that the assignee of such an estate, who is not bound by personal covenants, but liable from privity of estate, on covenants running with the land, may assign it to a beggar, a bankrupt, or even a feme covert, and such assignment is valid, and will discharge him from the subsequent rent. In one of the decided cases, *Strange*, 1220, 2 *Atk.* 546, where an assignee, to get rid of the term, assigned it to a female, a prisoner in the Fleet Prison, for five shillings, which money it appeared he had given or loaned her for the very purpose; the transaction was held not to be fraudulent, and the assignment valid, and the court professed to go upon equitable principles. If a man who has made an injudicious bargain, can assign it to a beggar to get rid of it, it is difficult to perceive why the more cautious man who anticipates evil by providing such person for the assignee in the first place, must be made to smart for his prudence. It is admitted that if Mr. *M'Mullen* had taken the deed on the 1st of *November*, 1821, and on the second, transferred it to *George Mercer*, that the plaintiff's remedy would only be against the latter. The equity, then, talked of, would seem to depend upon a form of conveyance. The jury will, however, understand these remarks with reference to the case before them, in which there is no testimony that Mr. *M'Mullen* ever took possession of the lot on or after the 1st of *November*, 1820, or that he ever received one farthing of its rents, issues, and profits, or in any way enjoyed it or them. There is a fallacy in the argument of

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the counsel for the plaintiff, when he urges that *M'Mullen*, if you find in his favour, will hold the land discharged of rent, supposing as he does, that he is the beneficial owner. This is not the case. The land is still liable. If improvements are erected upon it, as from its very eligible situation, it is most likely there will be soon, Mr. *Berry's* remedy by distress still remains, and he still can sell the land, by a suit, judgment and execution against the assignee of the soil. Upon the whole, gentlemen, the court are clearly of opinion that there is no principle of law or equity which under the circumstances of this particular case, will enable the plaintiff to maintain this action of covenant, and that your verdict should be for the defendant.

Rawle, jr., for the plaintiff in error, cited 2 *Mad.* 97: A resulting trust is equivalent to a declared trust. 1 *Mad.* 361. *Cestuy que trust* has the same power over the equitable estate that the legal owner has over the legal estate. 1 *Tid.* 605. *Willes*, 400. 8 *Serg. & Rawle*, 440.

Lowber, contra.—Covenant does not lie. No precedent is shown. There is no such thing as covenant founded on privity of estate. There must be privity of contract. The defendant must be a *party* to the deed, which he may become by accepting an assignment of the lease and entering into possession. 1 *Salk.* 81. 2 *Stra.* 1221. 2 *Atk.* 346. 1 *Dall.* 305. This is strictly a matter *at law*.

Broom, in reply.

ROGERS, J.—The facts of this cause have been well stated by the president of Court of the Common Pleas. It will be sufficient to refer to some established principles which govern this case, and, in my judgment, it is divested of its chief difficulty.

Covenant lies on privity of contract, and also on a privity of estate. An assignment does not relieve the covenantor from his personal liability, for he is responsible from privity of contract, but it discharges the assignee who assigns, for he is liable from privity of estate, and is charged merely because he enjoys the income, if any, and has the possession. The assignee, when the covenant runs with the land, takes it *cum onere*, and the covenants affect the owner of the title. When there is no adverse possession, the law adjudges the possession in him who has the right, and hence it is that the owner of wild and uncultivated land is deemed a possessor, so as to support trespass, *quare clausum fregit*. 3 *Serg. & Rawle*, 513. It is equally well settled, that the title of the *cestuy que trust* is recognised in the common law courts, and that in *Pennsylvania* he can support ejectment in his own name. From these principles which it is unnecessary to prove by authority, it results that there was but a single question of fact involved, what was the nature of the transactions between *M'Mullen* and *Mercer*. Was it a *bona fide* sale of the interest of *M'Mullen* to *Mercer*, a substitution of *Mercer* as the purchaser from the sheriff, or was

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Mercer a mere trustee for *M'Mullen*? If *Mercer* be the owner of the legal and equitable interest, the authorities relied on, *Strange*, 1220, 2 *Atk.* 546, (and which we do not intend to dispute,) apply with their utmost force. If, however, it was a mere mode of conveyance, *Mercer* having the legal and *M'Mullen* the beneficial interest, the possession of the property, the receipts of the benefits will render him liable to this suit. There exists the privity of estate, which alone is necessary to sustain covenant. Not to apply these rules to this transaction, would place the ground landlord, where there was nothing, as here, on the premises to distrain, in some measure, in the power of the owner of the fee, without exposing him at the same time to any inconvenience or risk. It would be for him to convey to an insolvent trustee, under the sanction of whose name he would retain possession, have the equitable title, and enjoy the profits of the property. It is not necessary that he should actually receive profits, or be in the actual possession of the land. It is sufficient that he is the owner of the equitable interest, and in the constructive possession; that he may improve the property if he chooses, and receive the income; or, may await, at his pleasure, and as he conceives to be his interest, a rise in its value. The laws regards substance, not form; and looks to a real transfer of property, not to a mere formal conveyance in which the legal title is in one, and the equitable title in another. It will be observed, that we do not intend to express any opinion on the facts. They were properly left by the court, in the first instance, to the jury, but afterwards withdrawn from them; in which I conceive there was manifest error.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, DECEMBER 26, 1827.]

WITMAN *against* LEX.

The Statute 43 *Eliz. c. 4*, of charitable uses, is not extended to *Pennsylvania*, but still the principles of it, as applied by chancery in *England*, obtain here, by force of our own common law, and relief will be given so far as the power of the courts will enable them.

A bequest of money to a church, to be laid out in bread annually for ten years, for the poor of the congregation, is good.

So is a bequest of money to trustees, with directions to invest it, so that the interest may be applied, from time to time, towards the education of young students in the ministry of a congregation, under the direction of the vestry.

THIS was an action, brought by the plaintiff as one of the residuary legatees, against *Peter Lex*, tried before the Chief Justice at *Nisi Prius*, where a verdict was rendered for the plaintiff, subject to the opinion of the court, as hereafter stated.

(Witman v. Lex.)

George Gottfreid Woelpper, by his will, dated the 19th of *November*, 1816, and proved the 25th of *July*, 1820, bequeathed, among other things, as follows:

"I give and bequeath the bond of five hundred dollars, given to me by the corporation of the *German Lutheran Church*, towards the payment of the debts of *St. Michael's* and *Zion's Churches*, in the city of *Philadelphia*. I give and bequeath the sum of one thousand dollars to *St. Michael's* and *Zion's Churches*, in the city of *Philadelphia*: and it is my will, that the interest of the said sum of one thousand dollars, shall be laid out in bread, annually, for ten years, *for the poor of the Lutheran congregation*, of which I am a member. I give and bequeath unto *Frederick Hoeckley*, lace and fringe weaver, and *Peter Lex*, and the survivor of them, and the executors, administrators, and assigns of such survivor, the sum of five thousand dollars, in trust, and to the intent that they, the said *Frederick Hoeckley* and *Peter Lex*, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall and do, as soon as conveniently can be after my decease, place the said sum of five thousand dollars at interest, on good security, in such manner, that the interest thereof shall be used and applied, from time to time, towards the education of young students in the ministry of the *German Lutheran congregation*, of which I am a member, under the direction of the vestrymen of *St. Michael's* and *Zion's Churches*, in the city of *Philadelphia*. I give and bequeath all the residue and remainder of my estate unto my wife *Mary Magdalen*, *Margaret Witman*, and *Catherine*, the present wife of *John Hentzman*, their executors, administrators, and assigns, part and share alike, as tenants in common.

The testator died in 1820. In 1765, *Thomas Penn* and *Richard Penn*, proprietaries of the province of *Pennsylvania* and counties of *Newcastle, Kent*, and *Sussex*, on *Delaware*, granted a charter to "divers members of the *German Lutheran congregation*, by the name of the rector, vestrymen, and churchwardens of the *German Lutheran congregation*, in and near the city of *Philadelphia*, in the province of *Pennsylvania*." On the 3d of *March*, 1780, the legislature of *Pennsylvania* passed "an act for confirming and amending the charter of the *German Lutheran congregation*, in and near the city of *Philadelphia*, in the province of *Pennsylvania*," and re-established the corporation under the name of "the ministers, vestrymen, and churchwardens, of the *German Lutheran congregation*, in and near the city of *Philadelphia*, in the state of *Pennsylvania*."

The plaintiff, one of the three residuary legatees, claimed one-third of six thousand dollars, and filed a refunding bond.

The surviving executor settled his accounts the 17th of *November*, 1821: balance thirty thousand, nine hundred and thirty-eight dollars, and sixty-six cents. He claimed the following credits:

July 20th, 1821. Retained, by this accountant, in the obligation

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of the corporation of *Spring Garden* district, in full of the legacy bequeathed to him and *Frederick Hoeckley*, in trust, five thousand dollars.

July 30th, 1821. Paid the corporation of the *German Lutheran* congregation, in full of their legacy, one thousand dollars.

Verdict for the plaintiff, for two thousand three hundred and fifteen dollars and sixty-seven cents, subject to the opinion of the court on the whole evidence. If the court shall be of opinion with the plaintiff, judgment for the plaintiff: if not, judgment for the defendant. But if the court shall be of opinion with the plaintiff in part only, the verdict to be altered from the notes of the Chief Justice, and judgment accordingly.

The case was argued by

J. R. Ingersoll, and *C. J. Ingersoll*, for the plaintiff, who cited *Bac. Ab. Corp. E.* 2 *Fonbl.* 211, 213, 219. 3 *Bl. Com.* 427. 4 *Wheat. Appendix*, 2 *Bl. Com.* 376. *Roberts on Wills*, 213, 214. 1 *Bac. Ab. Charitable Uses.* 5 *Vin. Ab. Charitable Uses.* 1 *Burn's Eccl. Law, Charitable Uses.* *Finch.* 221. 2 *Vern.* 118, 453. *Cas. Ch.* 134, 195. 2 *Eq. Ab.* 291. *Hob.* 136. 2 *Atk.* 339. *Duke's Charitable Uses*, 124, 349, 355, 359, 371, 466, 479. 2 *Vern.* 387. 4 *Wheat.* 36. *Stat. 9 Geo.* 2 c. 36. 4 *Co.* 104. *Com. Dig. Charitable Uses.* 8 *Vern.* 46, 56. 11 *Co.* 21. 4 *Vin. Ab.* 47. 2 *Ch. Cas.* 18. 3 *Binn. Appendix.* 5 *Harr. & Johns.* 392. 6 *Harr. & Johns.* 1. 10 *Co.* 57. 8 *Serg. & Rawle*, 45. 11 *Serg. & Rawle*, 104. 2 *Murphy*, 96. 11 *Wheat.* 153.

Randall and *T. Sergeant*, *contra*, cited 3 *Binn.* 596. *Charter of Penn.* 1 *Dall.* 67, 75. 6 *Co.* 22, 25. 2 *P. Wms.* 119. 1 *W. Bl. Rep.* 91. 2 *Vern.* 342. 1 *Bro. Ch.* 15. 3 *Bl. Com.* 427, 428. 4 *Wheat. Appendix*, 19, 20. 1 *Harr. & Mun.* 470. 12 *Mass.* 537, 546. 13 *Mass.* 371. 7 *Mass.* 319. 1 *Day*, 35. 3 *Conn. Rep.* 287. 7 *Johns. Ch.* 292. 4 *Murphy*, 96. 1 *Johns. Ch.* 527. 4 *Wheat.* 669. 1 *Bl. Com.* 479. 2 *Burn's Eccl. Law*, 547, 556. *Litt. Rep.* 49, 112, 114. *Act of Assembly*, 6th of April, 1791. *Purd. Dig.* 131. 2 *Com. Dig.* 299. *Freem.* 293. *Finch*, 403. *Godby.* 17. 2 *Eq. Ab.* 193. 1 *P. Wms.* 675. 7 *Mass.* 441. 1 *Penning. Rep.* 115. 6 *Serg. & Rawle*, 12. 3 *Conn. Rep.* 1. *Pow. Dev.* 421. 3 *P. Wms.* 40. *Amb.* 577. *Kyd Corp.* 101, 104. 1 *Co.* 21. 4 *Co.* 109. 11 *Co.* 57, 70. *Mease's Picture of Philadelphia*, 338, 341. *Const.* 1776, 5 *Sm. L.* 43.

The opinion of the court was delivered by

GIBSON, C. J. —The will of *George Gottsfreid Woelpper* contains two bequests, which are said to be void for uncertainty. The first is a bequest, to "*St. Michael's and Zion's Churches*," of one thousand dollars, the interest of which is directed to be laid out, for ten years, in bread "for the poor of the *Lutheran* congrega-

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tion," of which the testator was a member. The second is a bequest of five thousand dollars, to be put out in such manner that the interest shall be applied "towards the education of *young students*, in the ministry of the *German Lutheran* congregation, under the direction of the vestrymen of *St. Michael's* and *Zion's Churches*." These churches were jointly incorporated by the style of "the ministers, vestrymen, and churchwardens of the *German* congregation, in and near the city of *Philadelphia*, in the state of *Pennsylvania*."

At the common law of *England* these bequests could not be sustained, even where there is no uncertainty as to the person; if the bequest be on a trust not defined with reasonable certainty, it will fail; for it is clear the testator did not intend that the trustee should have the beneficial interest. Such a bequest, however, would take effect under the 43 *Elizabeth*, c. 4; and this has drawn the counsel to argue against the extension of that statute to this country, a point that must be conceded. But we consider the principles which chancery has adopted, in the application of its principles to particular cases, as obtaining here, not, indeed, by force of the statute, but as part of our own common law; and where the object is defined, and we are not restrained by the inadequacy of the instrument which we are compelled to employ, nearly, if not altogether, we give relief to that extent that chancery does in *England*. And this part of our system has been produced by causes which worked as powerfully here as did those which produced the system of relief that sprung from the statute of charitable uses. The simplicity which marked the lives of our forefathers, enabled them to do without many institutions that, in the present state of society, are absolutely indispensable. Incorporations were almost unknown; yet, to all sorts of pious and charitable associations, in every part of the province, valuable bequests were made by those who were ignorant of the niceties of expression necessary to accomplish the object at the common law, and who were not impressed with an opinion that it was at all necessary to consult counsel. Of this the will of the celebrated Dr. *Franklin*, which contains a bequest of money to be loaned for five years to young mechanics, is a striking instance. Yet such bequests have hitherto taken effect, without a question as to their validity. There are few worshipping congregations, of any pretensions to antiquity, who have not derived a part of their property from testamentary donations, that would have failed on the principles of the *English* common law. Nothing was more frequent than bequests to unincorporated congregations without the intervention of trustees; and, even where there was a corporation, it frequently happened that the corporate designation was mistaken or the trust vaguely defined: notwithstanding which, the testator's bounty was uniformly applied to its object. Surely a usage of such early origin and extensive application may claim the sanction of a

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law; resting, as it does, on the basis of all our laws of domestic origin—the legislation of common consent.

The inquiry then is, how far are the *English* decisions applicable to our circumstances? Chancery has gone an immeasurable distance beyond the statute,—two words in the preamble having been laid hold on as the germ of a system of decisions, whose principles are not to be traced to any of the enacting clauses. It is recited in the preamble, that lands, tenements, goods, &c. had been “*given, limited, appointed, and assigned,*” to certain enumerated charitable purposes, which had not been employed according to the charitable intent of the givers;—to remedy which, it is enacted that the chancellor may appoint commissioners to inquire of breaches of the trust in any such case, and make such orders and decrees as may be necessary to reform abuses, and compel an application of the fund to the objects contemplated by the donor. The rest consists of details necessary to carry the powers thus granted into effect. There is, therefore, no direct provision to establish a gift by supplying defects in the conveyance, or to aid it, in respect of the words used or the person to whom given; yet it has generally been held that the statute supplies all defects of assurance, when the donor is of capacity to dispose, and has an interest which he may transfer: so that a conveyance to a copyholder without a surrender, or by tenant in tail without a fine, or by a reversioner without attornment or enrollment, is taken to be a good limitation and appointment within the statute; and a gift of land to churchwardens, though void at law, was decreed in chancery, by force of the words “*limited and appointed,*” used in the preamble. So, also, of a gift of money for the use of the Church of *Dale*. “A devise to the poor people maintained in the Hospital in the parish of *St. Thomas*, in *Reading*, for ever,” was held good, although the poor, not being a corporation, were incapable of taking by that name; and it was decreed, that the mayor and burgesses of *Reading*, who were a corporation, and had in fact the government of the Hospital, should take for the benefit of the poor. So, a devise that the parson and churchwardens in *Thames Street, London*, and four honest men of that parish, should sell the land and employ the money for the poor and charitable uses in that parish; although the parson and churchwardens were not a corporation to take land out of *London*, or to sell it for such uses. These instances are taken from *Viner*, (*Charitable Uses, A. B.*) to show that chancery graduates the relief, not so much by the provisions of the statute as the necessities of the occasion. So that it may be said most of the decisions are independent of the statute, and therefore, in a great degree, applicable to the same wants and necessities elsewhere.

It is not intended to attempt an outline of this branch of our equitable jurisdiction, or to point out those particulars in which it differs from that which has been assumed in *England*. This must be a

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matter of gradual development, according to the exigency of the cases that may arise. It may safely be suggested, however, that in many particulars the relief which we shall be able to afford through the medium of common law forms, will necessarily fall short of that which would be administered by a chancellor. Indeed, no one would desire to see the doctrine of *cy pres* carried to the extravagant length that it was formerly, or witness the exercise of an arbitrary discretion in giving effect to a general intention to leave a sum of money to charitable purposes, to be designated thereafter, by disposing it to such charities as the court chooses to direct. No such discretion would be exercised by this court. On the other hand, not professing to found our jurisdiction on the statute, we are not bound, like the *English* courts, to restrain it to cases specifically enumerated in the preamble: and there is therefore little hazard in affirming that a bequest such as in *Morrice v. The Bishop of Durham*, 9 *Ves.* 399, in trust to pay debts and legacies, and to dispose of the residue to such objects of benevolence and liberality as the legatee may approve, would be sustained here. For the present it is sufficient to say, that it is immaterial whether the person to take be in *esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking, or not, or how uncertain the objects may be, provided there be a discretionary power vested any where over the application of the testator's bounty to those objects; or whether their corporate designation has been mistaken. If the intention sufficiently appears on the bequest, it would be held valid.

Since the argument of this cause and that of *The Trustees of the Baptist Church v. Shewell's Executors*; which depend on the same principles, on which it is deemed unnecessary to bestow a particular consideration, the public has been deprived of the services of two very valuable members of the court,—Chief Justice TILGHMAN and Mr. Justice DUNCAN, who we have the pleasure to say concurred in the opinion which is now expressed.

Judgment for the defendant—*non obstante veredicto*.

[PHILADELPHIA, DECEMBER 28, 1827.]

KEARNEY *against* TANNER.

IN ERROR.

Where on a sale of real estate there is an agreement by the vendee that he will pay the mortgage money due on it, and afterwards the vendor is compelled to pay it in virtue of his personal liability, assumpsit for money paid lies against the vendee.

It seems, if such mortgage money forms part of the price of the land, it is just that the vendee should pay it.

But it must appear money was paid, to sustain a *narr.* in assumpsit for money paid: substitution of a mortgage for a judgment will not amount to such payment.

Counsel may be permitted to withdraw part of a claim in summing up to a jury.

ERROR to the District Court for the city and county of *Philadelphia*, where a verdict and judgment were rendered in favour of *Henry S. Tanner*, the defendant in error and plaintiff below, against *Francis Kearney*, the plaintiff in error and defendant below.

The plaintiff declared in assumpsit for money paid, laid out, and expended to the use of the defendant, and claimed the sum of eight hundred and thirty-one dollars and thirty-three cents, with interest from the 24th of *March*, 1823.

The plaintiff and defendant with two others, in *January*, 1817, formed a co-partnership for three years in the engraving business, under the firm of *Tanner, Vallance, Kearney*, and Company. In 1820, the defendant, being desirous of retiring, the plaintiff agreed to purchase all his interest in the concern for the sum of three thousand dollars. The defendant, on the 12th of *January*, 1820, assigned his interest to the plaintiff, by an instrument in writing, and to pay the defendant, the plaintiff, on the same day, gave him his notes for eleven hundred dollars, (which were subsequently paid,) and conveyed to him a house and lot in Twelfth Street, in the city of *Philadelphia*, at the price of three thousand three hundred dollars, incumbered, previous to the deed, by the plaintiff's mortgages, which were accompanied by bonds and warrants of attorney, to the amount of one thousand four hundred dollars, subject to the payment of a ground rent to *Edward Burd*, Esq., by whom it had been originally granted to those under whom the plaintiff held. The defendant entered into possession and paid the ground rent and interest on the bonds and mortgages for a few years, when he abandoned the possession and refused any longer to pay them. The mortgagees sued out their mortgages; and, having obtained judgments, sold the property at public sale. It was bought by the plaintiff for one thousand and twenty-five dollars; but after applying the price for which it sold to the payment

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of the mortgages, there was a deficiency towards satisfying the remaining sum due on them and the ground rent together, of eight hundred and twenty-four dollars and thirty-one cents. The plaintiff being personally liable on the judgments entered on his bonds, satisfied the mortgagees by giving other mortgages on different property for their balance, and the ground landlord by giving his notes: and the mortgagees entered satisfaction on the old mortgages and on the judgments, which had been entered on the bonds; but no cash was paid before this suit on either of these accounts.

The plaintiff's counsel, on the trial, while concluding their arguments, withdrew the claim for ground rent, no money having been paid at the institution of the suit, nor the notes satisfied.

The defendant's counsel prayed the court to instruct the jury,

1. That the defendant did not render himself personally liable to the plaintiff to pay the mortgages executed by the plaintiff previous to the sale to the defendants.

2. Nor did he render himself personally liable to the holders of these mortgages.

3. That the defendant was only liable in respect of the estate held by him.

4. That the plaintiff cannot recover in the present action against the defendant, because no money was paid at the time he declares against the defendant as liable.

5. That if at the time the action was brought no money had been actually paid by the plaintiff on account of ground rent, then the plaintiff cannot recover.

6. That the giving a note for the ground rent is not such a payment as makes the defendant liable to the plaintiff therefor.

7. That the defendant is not liable for any interest due on the mortgage, further than the estate purchased by him.

8. That the defendant is not personally liable for any sum of money the plaintiff may have paid: 1st, on account of the ground; 2d, on account of the interest due on the mortgage.

9. That even though the general rule of law may render the defendant liable to the plaintiff for the deficiency of the mortgages; yet, if the jury believe it was understood and agreed that the defendant should not be liable, then the plaintiff cannot recover.

Charge of the court below:—

M'KEAN, President.—This action is called in law an action for money paid, laid out, and expended for the defendant. The plaintiff's claim is eight hundred and thirty-one dollars and thirty-three cents, with interest from the 24th of March, 1823. The claim is founded upon a contract. Much evidence may be thrown out of the question. The parties were partners for three years, and skilled in their profession, acquainted with each other, the nature and profits of their business, and the *quantum* and nature of their stock. The defendant was willing to go out of the firm; the plaintiff was

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willing to buy the share of the defendant; it was valued at three thousand dollars. The agreement was made, and there is no suggestion of fraud or overreaching. The terms of payment were, eleven hundred dollars in notes, and a house valued at three thousand three hundred dollars, on which there were mortgages to the amount of one thousand four hundred dollars. The defendant agreed to take the house. The defendant was liable to pay the ground rent and incumbrances on the property, if he knew of them when he purchased. That he knew of the incumbrances may be inferred from his payment of the interest. If the fact be, that he agreed to take the house subject to these incumbrances, then he undertook to pay them and indemnify the plaintiff, and is liable in this action. Of this fact you will determine and judge. The ground rent he undertook expressly to pay. Although the defendant purchased the property, yet the plaintiff continued liable, and *Kearney* became bound to indemnify him. The fact whether he purchased subject to these incumbrances you will determine; and, if you determine in the affirmative, then it results that, if the plaintiff is bound to pay, the defendant is liable. The defendant continued in possession until the sale by the sheriff. The plaintiff was compelled to pay the money. An execution levied is not necessary; it is sufficient if it be paid to prevent an execution against him. Judgment had been entered against the plaintiff; he was personally bound. The sale of the property was under the mortgages, but the plaintiff remained liable and his whole estate. He, therefore, must have purchased himself, or get some one to purchase for him, to protect himself: he purchased for one thousand and twenty-five dollars, subject to the mortgages.

As to the ground rent, it might be a question whether the defendant is liable, because the plaintiff was not personally bound; but of this you need not judge, as the plaintiff has withdrawn his claim for the ground rent in the present suit. It has been urged by the defendant, that the plaintiff had lost his claim by making the purchase. I do not see how it can have this effect. The payment of part cash, giving a new mortgage, and the entry of satisfaction of the old mortgage, are sufficient to bring this suit; and the defence of the defendant on this point is not well founded.

Two questions arise in this case:—

1. Did the defendant purchase the property subject to these incumbrances? If so, it is a part of the contract to pay them, there being no suggestion of fraud or circumvention.

2. Did the defendant thus undertake to pay these incumbrances? If so, then the plaintiff must recover: the principles of law are perfectly plain, and the only question to be determined in the case is a question of fact, which I leave to your decision.

To this opinion the defendant excepted.

Specifications of error, by the plaintiff in error.

1. It appeared in evidence, that at the time laid in the declara-

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tion; viz. (the 6th day of *February*, 1823,) no money whatever, or substitute for money, had been paid or delivered by the plaintiff to any person whatever.

2. The court directed that if a man purchase an estate, liable to a mortgage, he becomes bound to pay the same, as well personally as in respect of the estate; and adopts and makes the debt his own.

3. The court decided that *Kearney* was liable in this action to *Tanner* for the amount of the mortgage executed to *Tanner*, though *Tanner* became the owner of the same by a sheriff's sale, and the property reverted in him as before the purchase by *Kearney*.

4. Because the court decided the plaintiff below could maintain this form of action, (money paid, laid out, and expended,) without having paid any money, by having given new securities for the same.

5. Because the court allowed the plaintiff, while his counsel was concluding his addresses to the jury, to withdraw a part of the plaintiff's claim.

Randall, for the plaintiff in error.

T. Sergeant and *S. Levy*, *contra*.

The opinion of the court was delivered by

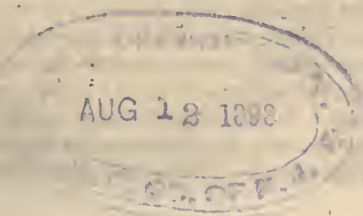
ROGERS, J.—It has been erroneously supposed, that it was adjudged by the late Judge M'KEAN, that a purchaser of mortgaged premises made himself personally liable to the mortgagee, for the amount due on the mortgage. If such had been the decision, it was well calculated to create alarm; as the assertion, by high authority, of a principle, heretofore not so understood by the profession, and most extensive in its operation. I was pleased to find on a careful examination, that this does not appear to have been his opinion. The charge of the court admits of this construction; and, when fairly considered, no other meaning can fairly be collected from it; that when there was an agreement that the vendee should pay the mortgage money, and afterwards the vendor had been compelled to pay the amount due on the mortgage, he could sustain an action for money paid, laid out, and expended against the purchaser. That an action will lie, where there is a special agreement either express or inferred from circumstances, is not denied; for, it forms part of the purchase money or price of the land, which it is just, and in compliance with his agreement, that the vendor should pay. But the defendant contends there was no such agreement; and that, as there was no actual payment of money by *Tanner*, the common money counts cannot be sustained. The facts necessary to raise the only point in the cause are fully stated in the bill of exceptions. It is not pretended there was an actual payment of the money, nor was there what has been considered in some cases as equivalent. The parties continue the same, the debt

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the same, but the security for the money is changed from a judgment, which is a general lien, to a mortgage, which is specific. And this distinguishes the case from *Slaymaker v. Gundaker's Executors*, 10 *Serg. & Rawle*, 75, where the debt, as well as the securities were changed. *Gundaker* ceased to be liable on the old note, and *Slaymaker* alone was liable to the bank, whose agents considered it as a payment of the note, on which *Gundaker* was endorser. The situation of *Kearney* is in no respect changed by the transaction which is alleged—to amount to payment. What is the necessary evidence to support an action for money paid, laid out, and expended, is clearly and explicitly ruled in the case of *Morrison v. Burkey*, 7 *Serg. & Rawle*, 238. A surety for another, on a bond, who gives the obligee a new bond with surety, and a warrant of attorney on which judgment is entered up, but no money is paid, cannot recover against the principal in an action on the common money counts for money paid, laid out, and expended. A specific article, or security advanced for another, is not money paid on his account. To recover on a general count for money paid, it should appear to be money *actually* and *necessarily* paid to the party's use. There must be an actual advance of money. The same principle is again operative in the case of *Doebler v. Fisher*, 14 *Serg. & Rawle*, 179, and in divers analogous cases decided on the common count for money had and received. After such repeated recognition of the principle; that there must be an actual payment of money, it would be unreasonable now to overthrow what has been so solemnly adjudged. It is better to suffer partial inconvenience than the law should have the appearance of having vibrated between two opinions. If the rule, *stare decisis*, has any application, it is here; and we have the less reluctance in adhering to these cases, as we consider this a mere question between a general and a special declaration. It is to be remarked, that there is no room for the presumption that the money was in fact paid by *Tanner*. The record negatives every presumption of the kind.

We have no doubt the plaintiff had a right to withdraw from the jury the demand of ground rent.

Judgment reversed, and a *venire facias de novo* awarded.



AUG 12 1888

[PHILADELPHIA, DECEMBER, 1827.]

SHAW and another *against* LEVY.

IN ERROR.

A party to a cause, sworn on his *voir dire* to his book of original entries, cannot be examined generally by the opposite party, without his consent, but can only be examined to show it was not his book of original entries, or that the entries were not made at the time.

Where there is a sale of personal property, and possession suffered to remain in the vendor, as between the vendor and vendee, the property belongs to the latter; but if the vendor transfer and delivered it to a new purchaser, *bona fide*, and without notice, such new purchaser is entitled to hold against the original vendee.

When goods are levied on, and taken in execution, the court ought to quash a replevin issued for them.

When, however, this is not done, a party may avail himself of the statute by pleading in abatement, or bar such levy and taking in execution, and the case of action on which the judgment and execution were obtained, cannot be inquired into in such case.

ERROR to the District Court for the city and county of *Philadelphia*.

The opinion of the court was delivered by

ROGERS, J.—The 3d of *January*, 1822, *Richard P. Lawrence*, being indebted to *Solomon Levy*, the defendant in error, on a note of one thousand dollars, sold him a chariottee. On the same day, a bill of sale was given for the property, and at the same time, a receipt was also given, by *Lawrence* to *Levy*, for the storage of the chariottee. The 6th of *April*, 1822, *Lawrence*, with whom the property was deposited on storage, sold the chariottee a second time to *Thomas Shaw*. *Shaw* alleged, that *Lawrence* was indebted to him eighty dollars for work done; that he held his note for three hundred dollars, and that these constituted the consideration of the purchase. *Shaw* took possession of the property, and brought it from *New York* to this city, *Shaw* confessed a judgment to one *Blouvelt*, who levied, seized, and took in execution, the chariottee, as the plaintiffs in error contend. This judgment was afterwards assigned to *Thomas Smith*, and *Solomon Levy*, who replevied the property from the hands of the sheriff. One of the defendants, *Shaw*, offered in evidence his book of original entries, to prove work and labour done by him, for *Lawrence*, to the amount of eighty dollars; and for this purpose, *Shaw* was sworn, to make true answers to such questions as should be put to him, relative to the matter before the court,—whereupon *Shaw* proved that it was his book of original entries, and that the entries were made by him at the time they bore date. They were then given in evidence. The counsel for the plaintiff then proposed to examine *Shaw*, generally as a

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witness; which being objected to, the court decided that he was compelled to make true answers to such questions as might be put to him, under the *court's direction*, as a witness, *generally*, in the case. This forms the first error assigned. The defendant, *Shaw*, was a witness only for a particular and special purpose, to prove his book of original entries, and questions the answers to which would have tended to prove, that this was not his book of original entries, or that the entries were not made at the time they bore date, would have been correct and proper. The inquiry appears not to have been confined within these limits, but seems to have been extended to a general inquiry into the merits of the whole transaction. *Shaw* was compelled to give evidence, *generally*, although he had been sworn merely on his *voir dire*, a novelty, certainly, in the practice of *Pennsylvania*. He might have been, with his *own consent*, examined as a witness, but he could not, according to the law of this state, be *compelled* to testify. 2 *Yeates*, 154, 163, 324. *Shaw*, so far from consenting, objected expressly by his counsel to his examination, *generally*, as a witness.

The next question which arises is, whether the bill of sale, from *Lawrence* to *Levy*, under the circumstances of this case, be fraudulent. It is alleged, that if it be not a moral, yet it is a legal fraud; that it is a fraudulent *per se*, and not merely evidence of fraud.

On the 3d of *January*, 1822, *Lawrence* gives a bill of sale of the chariottee to *Levy*, in payment of a debt, who leaves it in his possession on storage. There is no change of possession, no visible change of ownership. It remains in this situation, until the 6th of *April*, 1822, a period of more than three months, when the property was sold by *Lawrence* to *Shaw*, who takes immediate possession, and removes the property from *New York* to *Philadelphia*. As between *Levy* and a fair *bona fide* purchaser, without notice, *Levy* would have no right to the property. Whatever interest he might have had, would be divested by the sale. It would be fraudulent *per se*, and not merely evidence of fraud. 5 *Serg. & Rawle*, 275. 10 *Serg. & Rawle*, 201.

If there was actual or moral fraud, that is, a secret understanding between *Levy* and *Lawrence*, to cheat and defraud *Shaw*, or any person who might purchase, the question whether *Shaw* had or had not notice, or whether he, *Shaw*, was himself guilty of fraud, would be but of little consequence. In such a case, as no title to the property would have passed, *Lawrence* would have had a right to sell to whom he pleased. The law would not have assisted either party, but would have adjudged the property to *Shaw*, who, at the time of the replevin, had the possession of the chariottee. But if this were a fair transaction between *Lawrence* and *Levy*, it becomes a most material question for the jury to decide, whether *Shaw* was a *bona fide* purchaser without notice of

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the sale, previously made by *Lawrence* to *Levy*. If *Shaw* had notice of the previous sale, what right has he to complain? In purchasing property, which he knew to belong to another, he himself would be guilty of an actual fraud, and as *Levy* could have recovered the property from *Lawrence*, had there been no transfer, so he shall recover from *Shaw*: having notice, he can be in no better situation than the person from whom he purchased. But if *Shaw* purchased *bona fide*, he would have a right to allege, that he had no notice of the transfer of the chariottee, and had no means of ascertaining the real situation of the property—that possession of personal property is *prima facie* evidence of ownership; that *Lawrence* was at one time the owner, and that nothing which had taken place, could lead him to the knowledge, that he had sold the property to *Levy*; that a symbolical delivery of the article, was not sufficient, but that the law required, that the delivery, so far as was practicable, should be an external visible change of property or possession, open and apparent to the world, and not a mere formal delivery on paper, while the ostensible owner remains unchanged. I do not consider that this principle depends upon a secret trust between the original parties, but on public policy, and the sound maxim of morality and law, that where one of two innocent persons must suffer, he who is the cause of the loss must bear it. Wherever there is a sale of property, and no actual possession delivered, it remains at the risk of the purchaser: as between him, and the vendor, the property is his; but when it passes into the hands of a *bona fide* purchaser, without notice, it would be against sound policy to permit a recovery. The maxim *caveat emptor*, does not apply. I hold the law to be the same, whether the possessor be the immediate purchaser from the original vendor, or from his fraudulent vendee. Thus, if *Lawrence* had sold the chariottee to *Shaw*, with notice, and *Shaw* had sold to *Smith*, without notice, *Levy* could not recover from *Smith*. It was his own folly to leave the chariottee in the possession of *Lawrence*, and others are not to suffer from his negligence or neglect. A *bona fide* purchaser from a party who has acquired goods by fraud, is in a different situation from the creditors of such a party. The original vendor, when reducing the sale, is entitled to reclaim the goods from the creditors, as well as from the vendee himself, because they cannot lawfully profit by the fraud of their debtor. But when the goods have been resold before the reduction of the first sale, to a party who has bought them in *bona fide*, there is no ground either in legal principle, or upon equitable considerations, for allowing the original vendor to reclaim them from such purchaser. In all cases, where a competition occurred between the original vendor, and the creditors of the fraudulent vendee, it was admitted and taken for granted, that a vendor would have no right to reclaim the goods from a *bona fide* purchaser. It is only, however, where the second

(Shaw and another v. Levy.)

purchaser is in *bona fide*, that he is thus safe from the demand of the original owner of the goods. If he has purchased them in the knowledge that they were fraudulently acquired by his vendor, he thereby becomes *particeps fraudis*, and the goods may be reclaimed from him by the original owner, in the same way as they might have been from his vendor. 1 *Brown's Law of Sales*, 416, 417.

The court were requested to charge the jury,—that if the property in question had been levied upon by *Blouvelt's* execution, before the writ of replevin issued, the writ of replevin is void, and the plaintiff cannot recover. The court answer,—that, the execution cannot operate in the case, because it appears the goods were not levied on; and if they were, the defendant must prove it was for a *bona fide* debt. It is provided, by an act of assembly, passed on the 3d of *April*, 1779, (1 *Smith*, 476,) that all writs of replevin granted or issued for any owner or owners, of any goods or chattels, levied, seized, or taken in execution, or by distress, or otherwise, by any sheriff, naval officer, lieutenant, or sub-lieutenant of the city of *Philadelphia*, or of any county, constable, collector of public taxes, or other officer, acting in their several offices, under the authority of the state, are *irregular, erroneous, and void*; and that all such writs may, and *shall*, at any time after the *service*, be quashed on motion by the court, to which they are returnable, the said court being ascertained of the fact, by affidavit, or *otherwise*. The second section provides, that the court shall award treble costs, and also may order an attachment against a prothonotary or clerk, who grants such writ, knowing that it is for goods and chattels, taken in execution, or seized as aforesaid. The motives for passing this highly beneficial act, are set forth in the preamble, by the legislature themselves, to be, to remedy an abuse which had prevailed, in granting writs of replevin, for goods and chattels taken in execution, and for fines and penalties due the commonwealth, to the delay of public justice, and to the great vexation of the officers concerned in taking or levying the same. The anxiety of the legislature to remedy the mischief appears in the penalties they have imposed for its wilful violation. It is intended to prevent delay, and also for the security of the officer concerned in the levy. The least reflection will serve to show the mischief to which such a practice must necessarily lead; so much so, that it is impossible to foresee the extent to which a creditor may be delayed in his just demands, by a litigious and fraudulent debtor. An execution, which is the end of the law, would be only the commencement of a new law suit, and so, *toties quoties*, as his goods were taken in execution by the public officer.

In this case an application was made to quash the writ, which was refused, but, for what reason, does not distinctly appear; nor do I exactly understand the grounds on which the court express their opinion that the goods were not expressly levied on; whether

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they were not levied on, in point of fact, or whether their objection was to the manner in which the levy was made. If the chariottee was levied on, seized, and taken in execution, the court, on motion, should have quashed the writ. Having refused the application to quash, can the court be called on, under the pleadings in this cause, to instruct the jury that the action cannot be sustained? Had the defendants intended to rely on this as a defence to the action, they should have pleaded in abatement, or in bar. The plaintiff would then have come prepared to meet the defendant, on the issue, that the goods were seized and taken in execution at the time of replevin. The court may ascertain the facts, either by affidavit or otherwise; that is, as I understand it, with the intervention of a jury, referred to them by a plea in abatement or in bar. Where the fact, or the law arising on the facts, was doubtful, a prudent judge would refuse to quash on *affidavit*, but would leave the party to his plea. In this way, and in this way only, he would have the assistance of the jury, and would secure to the party a review of his opinion on the law of the case, by the Supreme Court. The legislature intended that the party should have a summary remedy, but not that he should be confined to a motion to quash, for they have made the writ *irregular, erroneous, and void*.

I cannot concur with the learned judge, that the defendants were bound to prove that it was for a *bona fide* debt, before they could have the protection of the statute. All they had to do, was to show that the property replevied was levied, seized, and taken in execution in pursuance of an execution regularly issued. The validity of the judgment, or whether fraudulent or not, *in such case*, cannot in my opinion, be inquired into. The legislature impose no hardship on the owner of the property. They do not divest his right, but merely prevent him from pursuing a remedy by replevin, upon the ground of public policy, the danger of delay, and of vexation to public officers. He has his remedy against the sheriff, and his replevin against the sheriff's vendee. His security is most ample, without resorting to the action of replevin.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, DECEMBER, 1827.]

MACKENTILE *against* SAVOY, Trustee of SALTER.

IN ERROR.

The owner of a lot, forty-eight front, divides it into three lots, and erects three buildings thereon: after his death, his children, to whom they descended, make partition by deed, assigning two of the houses and lots to one child, and one house and lot to the other child, by metes and bounds; it having previously been ascertained, that the westernmost line of the original lot was laid two feet and a half on the ground of a third person: *it seems*, the owner of the westernmost house and lot, claiming under one of the children, must bear the loss, and cannot come on the owner of the adjoining lot to compensate it. What possession of a city lot is required under the statute of limitations.

WRIT of error to the District Court of the city and county of *Philadelphia*.

The case was argued by *H. Hopkins*, for the plaintiff in error, and *Gilpin* and *J. R. Ingersoll*, *contra*.

The opinion of the court was delivered by

Top, J.—In this action of ejectment, *Sarah Saller*, the real plaintiff below, and defendant in error, demanded of *Mackentile*, an undivided fourth part of a house and lot of ground in the city of *Philadelphia*, and obtained therefor a verdict and judgment. In the judgment thus far, no error is complained of. But the plaintiff also demanded in the same writ, not an undivided part, but the whole, of a strip of ground two and a half feet wide, part of a lot upon which a frame dwelling-house was erected. Whether the judgment obtained by the plaintiff for this part of the property in dispute is valid, is the question.

The title and claim on both sides, appear thus:—In 1781, the ground in dispute, and the ground adjoining it, being public property, the supreme executive council laid out a part between Sixth and Seventh Streets, into lots twenty-four feet wide, fronting on Pine Street on the north. In 1784, two of these lots adjoining each other, became the property of *Anthony Lautier*; who, thus having a front of forty-eight feet, made a new subdivision of his own into three building lots, two of them fifteen feet in front, the eastern lot eighteen feet in front, including an alley of three feet, to extend a certain distance back, apparently for the accommodation of the eastern and middle lots. He erected a dwelling-house on each lot, the western house of brick, the middle one also brick, and on the eastern lot, a part of which is the ground in dispute, a frame building.

Anthony Lautier then died intestate, leaving two children, *Mary* and *Benjamin*, who agreed to divide the premises; and, by deed of partition, dated the 26th of *November*, 1799, did divide the property between them. The deed of partition was duly recorded. With exceeding minuteness, it gives not only the length and breadth,

(*Mackentile v. Savoy, Trustee of Salter.*)

but the boundaries of each lot on all sides. It assigns the western brick house and lot, also the frame house and lot to *Mary*. To *Benjamin*, the middle house and lot, and the use of the alley, in these words: "And that he, the said *Benjamin Lautier*, and his heirs, shall have, hold, and enjoy, all that certain two story brick messuage and tenement, and lot or piece of ground, being the middle part of the first above described large lot, containing in front or breadth on the said Pine Street, fifteen feet, and extending in length or depth southward, one hundred feet; bounded on the north by the said Pine Street, on the east partly by the said three feet alley, and partly by the said last described lot, on the south by other ground late of the said *White Matlack*, and on the west by the said brick messuage and lot herein before assigned to *Mary Rogiay*, together with the common use and privilege of the said three feet alley," &c.

The whole of this property soon went out of the hands of the children of *Anthony Lautier*. *Mackentile*, the defendant, claims to hold the frame house under a purchase from the heirs of *Mary*. *Benjamin Lautier* became in debt, and the sheriff sold his middle brick house and lot to *Salter*. And, on an execution against *Mary*, the sheriff sold her western brick house and lot to *John Gest*.

It was a fact proved in the cause, and from that fact the dispute arises, that in laying out the ground originally, a mistake was committed, by whom is not said, of two feet six inches; and *Anthony Lautier's* purchase was located through that mistake, too near Seventh Street by so much. But it may be material to consider that the two and a half feet of bad title is not, by any means, the ground now in question, but altogether on the other side. The ground sued for, is part of the outside lot nearest Sixth Street. The interference was on the outside edge of the outside lot nearest Seventh Street. The mistake was discovered, as is recited in one of the deeds, "by *James Pearson*, one of the city surveyors, on the 18th of June, 1799, by accurate measurement and plot recorded in Deed Book No. 77, page 167."

Now Mrs. *Salter*, the plaintiff below, the owner of the middle house, whose deed from the sheriff recites the indenture of partition, and describes the property as it is described in the partitions, bounding her expressly upon the three feet alley, sues the defendant, the owner of the frame house; and demands two and a half feet, including so much of the alley, one of the boundaries in her own deed, leaving a remnant of the alley, of six inches, to the defendant.

The claim of the plaintiff below appears to be supported by a process of reasoning as follows:—1. The western brick house, now belonging to *John Gest*, was built by encroachment two and a half feet on the ground of another, who would have a right to take the ground and demolish the wall; and though there is no proof that the western building ever actually did lose any ground by the mis-

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take, that makes no difference as to the principle. 2. *Gest* losing, or being liable to lose, the wall of his house by the mistake, the law permits him to make up his fifteen feet out of the middle lot, and to indemnify himself by taking so much of the wall of the middle house. And, 3. The two and a half feet of bad title being thus lifted from its place and cast by *Gest* upon *Salter*, *Salter*, in her turn, has the same right to throw it upon *Mackentile*, and so on: That is to say, if I understand the exact grounds of the claim, if *Anthony Lautier*, instead of forty-eight feet only, had been able to purchase all the ground down to Sixth Street, had laid it out in lots of fifteen feet, covered them with houses, and sold them to separate purchasers, and then the mistake of two and a half feet at the start had been discovered, there would be a sort of contagion in the business, the defect and mistake would not be local and confined to its own place, but would be set afloat by the law, and shifted from one to another by a string of ejectments, until it had gone through every house to the end of the block, leaving all the owners but the first and the last, exactly as they were before this correction of errors, except the motion of thirty inches to the east, and the loss of one wall to each house, and except two law suits upon each owner, on the left hand as defendant, and the other on the right hand as plaintiff.

It strikes me this doctrine would be exceedingly troublesome in practice. Is it the law? In a case of such frequent occurrence there ought to be no doubt—I think there is none.

If *A. Lautier*, himself, had disposed of the property in question, it will not be said that he could have been permitted to correct his own mistake at the expense of his alienee. But the present case appears much stronger for the defendant than if *A. Lautier* was alive and was himself the plaintiff: because they who succeeded to his rights, his children, five months after the mistake was discovered, corrected it by the deed of partition, describing the property minutely, as if for the very purpose of silencing all disputes about measurement, and dividing the houses not by imaginary lines, but the lines they were built by. If *A. Lautier* had left a will giving the property to his son and daughter, and dividing it as in the deed of partition, there could be no doubt in the case. Or, if the children had been unable to agree to a partition, and a jury had been called to do it by process of law, it seems impossible that a plan such as is here argued for, could have entered into their heads, of dividing three houses between two heirs, and giving a whole house to neither, or of demolishing the entire block of buildings, because as to one of them the title for two or three feet was defective.

I am anxious that the opinion and the reasons of the court in this case should be fully explained, even at the risk of being tedious; because we are about to reverse the decision of a very respectable court, also to overrule sundry awards of arbitrators in this and previous cases on the same points of law; and because it seems

(Mackentile v. Savoy, Trustee of Salter.)

to me that the matter in dispute, small as it is, involves a principle affecting the title of real estate throughout the commonwealth. The present is not a case which sometimes happens, of a sale of building lots without a fixed boundary, and to be ascertained by number and distance. There the purchaser must take heed, because building over, even by mistake, may not give him a title to the ground of his neighbour. What we decide now is, that where contiguous lots are bought and built upon by a purchaser, his mistake, if he makes one, though not conclusive against his neighbour, yet is conclusive against himself and against all claiming under him.

A deed of partition is equivalent to a grant. "*A partition of lands in fee simple by persons of full age, sound memory, and not covert, by agreement between them, is good and firm for ever. Litt. Sec. 55.*" 1 Inst. 166, a.

As clear it is, that by law, *Sarah Salter* claiming under *Anthony Lautier*, and under his children, is bound by their acts and by their deed of partition. In such case, the rule is—*All privies in blood, as the heir, privies in estate as the feoffee, lessee, &c., privies in law as the lord by escheat, tenant by the curtesy, tenant in dower, shall be bound.* 1 Inst. 352, a.

Again, the rule of law is most unquestionable, that when real property is granted, divided, or disposed of in any way, by various descriptions, by visible permanent marks and bounds, and at the same time described by distance, by calculation as to quantity, or by any sort of measurement, there if the different descriptions clash, the permanent boundaries shall control and annul the result of the calculation or measurement. As, if such a house is granted, described as extending eighteen feet, though it is found to extend twenty feet, or thirty; the whole house passes by the grant. So, if described as fifteen feet, though it contains only twelve, the grantee has no title further, and cannot make up his quantity out of the adjoining ground, though owned by the same grantor. If he has any remedy, it must be on the covenants in his deed, and not by ejectment.

How intolerable it would be in the country, every one would perceive, if a man holding a patent for one hundred acres, marked and bounded on all sides according to law, and finding that by some mistake, he has in fact but eighty acres, could, to make up the deficiency, break into the lines of his neighbours, and that neighbour, in his turn, upon the one next beyond him, and so on throughout. This would be a strange way of mending errors: out of one to make one hundred; and a mistake in boundaries once started, never to let die till it had gone through the country. Nor do I see why such a rule would not be equally inconvenient in a populous city, and more so, it being certainly less destructive to move the fence of a farm, than it is the wall of a brick house.

The record shows that *Sarah Salter*; the plaintiff below, gave parol evidence that by occasion of the original mistake in measure-

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ment, she had actually lost two and a half feet of the middle lot and house, by an ejectment brought by *Gest*, who had purchased the western brick house when sold by the sheriff, and that to save the property, she had been obliged to pay *Gest* five hundred dollars. This testimony was admitted by consent, evidently: because, when afterwards the record of *Gest's* recovery was offered in evidence, it was opposed by the defendant's counsel and rejected by the court. And the court was most clearly right in rejecting it; for, not only was the recovery between other parties, but was in itself, flagrantly wrong. It seems clear that the arbitrators who decided that cause, could not have had the full merits and facts of it laid before them. There all the objections which apply to the present case applied to that plaintiff. He, *Gest*, not only claimed in right of *Mary*, and standing in her place, had her previous deed opposed to him upon the records, assuring, if any thing in title can be called an assurance, to *Benjamin Lautier*, his heirs and assigns, that middle brick house as it stood entire; but the very mistake itself had been discovered five months before the partition, and *Mary* had taken the frame house with a good title, and the western brick house with a bad title as to two and a half feet for her share, and *Benjamin*, the middle brick house, where there was no bad title, for his share. Further, *Gest* had not the pretext, very poor as it would be, of the loss of two and a half feet of his own western house by the mistake. He appears never to have lost any part: and a very good reason there is for it. For *Mary*, before the property had been sold from her to *John Gest* by the sheriff, had taken the only rational mode of correcting the fault of building upon another man's ground, by buying out the interference, and obtaining a deed from *James I. Mazurie*, the owner, for the whole disputed two and a half feet, as far as it interfered with her brick house, and paid him for it one hundred and seventy-nine dollars. The full benefit of which purchase, is enjoyed by *John Gest*, coming into possession under the sheriff's deed. Yet the mistake of measurement has been kept up ever since, and kept moving: and, oddly enough, Mr. *Gest*, the very man to whom the piece of bad title, if it yet existed, would solely belong; instead of twelve and a half feet, has had his front made up to seventeen and a half feet, by the equivalent of five hundred dollars, by men who when they decided in his favour, most certainly, in my opinion, had not the full facts before them, otherwise such a ransom would never have been imposed to save the wall of the middle house. But, however, that may be, such payment, upon no principle of law or equity, could give to this plaintiff a right to recover in the present case, and the evidence was properly rejected.

The word estoppel has been much dwelt upon by the counsel for the defendant in error, in this argument. They say that estoppels are not favoured in the law, but are pronounced odious; that they preclude a party from saying the truth, and must be certain to

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every intent, or they can hurt nobody: and the law is so. But, notwithstanding the same word was first introduced by *Mackentile's* counsel in his points to the court below, contending that no averment should be suffered against the words of the deeds; still, I apprehend there is nothing in this case of the common law notion of estoppel, excepting the name. Any other word of similar import would have done as well. There is nothing odious in holding a man and his representatives bound by a fair deed on a sale or partition of land. Besides, the strict estoppel of the old common law is, I apprehend, when the deed or record which estops a party is produced against him by the other side. Here, the indenture of partition, which, according to the argument on behalf of the defendant in error, must be absolutely certain to every intent, or go for nothing, is a part of her own title, produced by herself.

As this cause is to be again tried, there is another point of it appearing on the record, and necessary to be decided by this court. The act of limitations was relied on by the defendant below. That part of the defence does not, from the record, appear to have been brought directly to the consideration of the court. It would seem to me, that beyond all question, if there had been nothing else in the case, the limitation would of itself be a complete defence against this ejectment, as far as respects the two and a half feet in question. The deed of partition seems to have given exclusive possession to *Mary* on the 26th of *November, 1799*. On that day the twenty-one years began to run against *Benjamin Lautier*. This suit was brought in 1823, after a possession of twenty-three or twenty-four years. There appears exceeding refinement in the argument, which requires direct proof of occupancy during that time. No evidence is given that *Benjamin Lautier*, or *Mrs. Salter*, claiming under him, have had possession of the premises in dispute for one moment during the twenty-four years. Is it to be contended that possession of a dwelling-house in this city is like a settlement right in the woods, only to be kept up by constant occupancy? If legal possession of such property could only be by a succession of tenants without a vacancy of a day, then I would be content, in the absence of all proof to the contrary, to presume such continued possession in order to give the benefit of the act of limitations against a suit of vexation, for the wall of a man's house, on a mistake of measurement committed forty odd years ago. Perhaps, if the different owners from 1799 to this day had kept the house locked up without doing any thing further than to repair it and pay the taxes, such possession would come under the safeguard of the act of limitations as effectually as if they had kept a family upon every floor for every hour of the time.

Other errors have been assigned. We think there is nothing in them.

The unanimous opinion of the court is, that the judgment be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, DECEMBER, 1827.]

THOMPSON and others *against* M'CLENACHAN and others.

IN ERROR.

Husband and wife, by deed duly executed, conveyed the wife's estates to G. M. P., in trust to convey to the husband and wife during their lives and the life of the survivor, and the remainder to the heirs of R. M. and A. his wife, and their heirs. The trustee, G. M. P., by a deed dated five days after, but executed at the same time, and intended to express the meaning of the grantors, and drawn by their direction, conveyed to the grantors during their lives and the life of the survivors, and separate remainders of the separate tracts to the respective children of R. M. and A. in fee simple: *Held*, that they were to be considered as one conveyance, and the estates were vested under the latter deed; and, also, that parol evidence was admissible, to show the intent of the grantors to be what the latter deed expressed.

WRIT of error to the Court of Common Pleas of *Montgomery* county, in an ejectment for lands in *Lower Merion* township, brought by *Robert M'Clenachan* and *William Diehl*, and *Hannah* his wife, late *Hannah M'Clenachan*, plaintiffs below and defendants in error, against *John Thompson* and others, defendants below and plaintiffs in error. The court below, on the case stated, rendered judgment for the plaintiffs in that court.

The case was argued here by *Kittera* and *Binney*, for the plaintiffs in error, and *J. R. Ingersoll* and *Chauncey*, *contra*.

The opinion of the court was delivered by

HUSTON, J.—This case has been elaborately and ably argued. The counsel have, however, embraced, in the discussion, much ground over which it will not be necessary to follow them. The view I shall take of the cause will bring me to a conclusion without deciding many of the points raised in the argument.

It is assumed by both parties, that the late *Charles Thompson* and *Hannah* his wife, were possessed of a valuable estate in lands, of which the fee simple was in Mrs. *Hannah Thompson*; and in which, as they never had children, *Charles Thompson* had not a claim to tenancy by the curtesy. I shall state the parol evidence in the cause, as well as the deeds which have been executed: clearly, in the cause now trying, *Charles Thompson* had not a spark of interest; and not even the bias which might be supposed to arise from relationship to the parties. The claimants are none of them related to *Charles Thompson*, otherwise than as relations of his wife; and as such their affinity to him is the same.

In *November, 1798*, Mrs. *Thompson*, wishing to make a provision for her husband during his life, if he survived her, and to settle her estate after her own death, and that of her husband, on consulting with him directed certain conveyances to be prepared;

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and he employed a scrivener in the neighbourhood to draw them. They were a deed dated the 17th of *November*, 1798, from *Charles Thompson* and *Hannah* his wife, by which several tracts of land, particularly described, were conveyed to *G. M. Potts*, the son of the scrivener, and to his heirs; "In trust, nevertheless, for the purpose of conveying the whole use and profits of all and singular the aforesaid described tracts of land, with their and every of their appurtenances, unto the said *Charles Thompson* and *Hannah* his wife, during the term of their natural lives, and the life of the survivor of them; and the remainder over, after their decease, to the heirs of *Robert M'Clenachan* and *Amelia* his wife, in fee simple;" reserving a life estate, in a small part thereof, for *Page Codorus*, a black lad, born in the family of *Charles Thompson*. This deed was duly acknowledged by Mr. and Mrs. *Thompson*.

The second deed, which was dated the 22d of *November*, 1798, was from *G. M. Potts*, the trustee. After reciting the before-mentioned deed to him from *Charles Thompson* and his wife, it proceeds: "*G. M. Potts*, to execute the said trust, grants to *Charles Thompson* and *Hannah* his wife, the five tracts aforesaid, during their joint lives, and the life of the survivor, and the remainder over, after their decease, in the manner following; viz. to the above named *Robert M'Clenachan*, the younger, (a son of *Robert* and *Amelia M'Clenachan*,) a certain piece of land, part of *Harriton*, (and here it is particularly described,) containing one hundred acres. And to the said *Charles M'Clenachan*, (another son of *Robert* and *Amelia*,) and his heirs and assigns, all the residue of the *Harriton* plantation, containing five hundred and ninety-eight acres more or less; (reserving a small part, particularly described, to *Page Codorus*, during his life.) And to *John M'Clenachan*, (another son of *Robert* and *Amelia M'Clenachan*,) his heirs and assigns, two tracts, particularly describing them; one containing one hundred and fifty acres, and the other seventy-six acres: and to *Hannah M'Clenachan* and her heirs, (a daughter of *Robert* and *Amelia*,) the two remaining tracts, particularly describing them; one containing one hundred and fifty-six acres twelve perches, and the other one hundred and fifty acres."

It was fully proved that this latter deed, as well as the first, was prepared by the direction and consent of *Hannah Thompson* and her husband; that the trustee never saw either of the deeds, or was consulted as to their form or contents, until the day they were executed; that the deeds were executed on the same day, and at the same time and place; that both were signed and sealed before either was attested by the witnesses, and the first duly acknowledged by Mrs. *Thompson*; whose examination, as it appeared, was separate and apart from her husband, and knew the contents: and it was proved, that the second deed, from *G. M. Potts*, was executed by him at the request of Mrs. *Thompson*, as well as of her husband, for the purpose of vesting the several portions of land

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in the persons severally named, and in the manner mentioned and specified in the said deed from *G. M. Potts*.

It will be unnecessary to decide what estate the children of *Robert* and *Amelia M'Clenachan* would have taken if the second deed had never been executed, or had been drawn and executed at a different time and under different circumstances; for we are of opinion, that, on the evidence in this cause, the two instruments are to be considered as parts of the same transaction, made for the same purpose, directed by the same mind, and carrying into effect the same plan; and that, so viewed and explained, there is no inconsistency between them. As there is no inconsistency or repugnance in a deed, which, in the premises states, that the grantor has a plantation, and makes that deed to grant it to his two children, and then proceeds to describe a part specifically, and gives that part to one child, and the remaining part to the other; for the *habendum* may make that special and particular, which in the premises is more general and indefinite.

It has been contended, that this deed of *Charles Thompson* and wife, being the deed of a married woman, which has its effect from her separate examination and acknowledgment, cannot be in any manner affected by parol proof; but must stand unalterable in the very words it is written. Independent of authority on this subject, the law could not be so. A woman sole may sign a deed which from fraud or mistake does not convey what she intended, nor to whom she intended. All agree that this, on due proof, may be set right. A married woman has as much understanding, can form a design with as much intelligence as before she was married, or when she becomes a widow: but a married woman's directions may be mistaken or misrepresented in a deed as well as those of a single woman; and there is precisely as much reason for ratifying in the one case as in the other. The very provision in the law—that she shall be examined apart from her husband, and the contents be known—is, on the ground that she has a mind, a plan, an intention, and a design to be effected by the deed she executes. The separate examination is solely to guard against the influence of her husband; and, when that is done, her deed is to be considered in law the same as if it was the deed of the same woman being a feme sole.

We have an authority on this point which, unless we overrule it, decides this case. *Thompson and Wife v. White*, 1 *Dall.* 429, was the case of a deed by Mrs. *Saltar*, a married woman, in whom was vested the fee simple of the estate; having no children she wished it to be conveyed to her husband, if he survived her, during life; then to her sister, and if she died without issue, to her half-sisters; but an absolute deed was made by her husband and her to her brother-in-law, who made an absolute deed in fee simple to her husband, who was to have conveyed or demised to her sister, the remainder to her half-sisters. Mrs. *Saltar* died, and then her hus-

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band and his heir entered; her sister and husband brought ejectment, and recovered. In that case she had joined her husband in the deed conveying the land in fee simple to his brother, who honestly reconveyed it to her husband; proof was admitted that these conveyances, though on the face of them absolute, were in fact in trust: what that trust was, and for whom, was made out by parol, and the *cestui que trust* recovered.

If the deed, in the case before the court, to *G. M. Potts* had been absolute, and a reconveyance to *Charles Thompson* and wife in fee, parol evidence might have set aside the estate thereby created, and the intention of Mrs. *Thompson* would have been carried into effect in direct opposition to both the deeds; and it would be strange if parol evidence will not be admitted to give effect to both the deeds, and to show that taken together they distinctly and perfectly accord with her intentions. If it should be said there was fraud in that case, I reply that mistake is as much and as reasonable a ground of relief as fraud; but what fraud existed in that case more than in this? *White*, the defendant, claimed as heir of *L. Saltar*; the deeds appeared fair, and Mrs. *Saltar* had acknowledged the first in due form, or the question would not have arisen. The only fraud in the defendant, was in claiming what he had heard, and perhaps believed, was intended to have been given to another; and I see no reason to suppose the plaintiffs below in this cause have any less information of the intention of Mrs. *Thompson*, and this second deed being agreeably to her intention, than *White* had in that case: whatever may be their knowledge on this subject, is not for us to inquire. The whole evidence makes out a plain case in favour of the heir of *Charles M'Clenachan*, to the part conveyed to him.

There is scarcely any subject more perplexed than in what cases and to what extent parol evidence shall be admitted. Not only have different men viewed the subject differently, but the same man at different times, has held opinions not easily reconciled, and I doubt whether any lawyer of many years standing, and much reflection, can say his mind has never wavered on this subject. In theory, adhere to the writing—neither see nor hear any thing out of the deed, seems to sound well; and it would work well in practice, if all who gave instructions to scriveners were perfect; if all scriveners perfectly understood their instructions, and put them on paper perfectly according to law, and the whole was completed by executing them at the time and in the order and manner which their nature and the law requires; but when this perfection cannot be even imagined to exist in this world, and the want of it is as apparent in deeds and other writings, as any where else, the beautiful theory must yield to substantial justice. In the present case the testimony is full and clear, the witnesses unexceptionable, and the great if not the only difficulty arises from the difference of the dates of the deeds:

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when it is once proven that they were executed together, and that both were drawn by the instructions of the same person, and that person the grantor, no doubt can remain, for the latter is rather explanatory of the former than contradictory. *G. W. Potts*, the trustee, was but an instrument in the hands of *Charles Thompson* and wife; his seisin was but for an instant, and for a particular purpose; his wife would not have dower out of these lands, nor a judgment against him be a lien on it. *Mrs. Thompson* could not convey to her husband a life estate or any estate; to give the husband a life estate a trustee was interposed—but for this, it is apparent the conveyance would have been made directly to the several persons of the name of *M'Clenachan*, for such estate and for such parts of the land as pleased *Mrs. Thompson*. If *G. W. Potts* had not executed the trust for some years, if it did not appear that all was done according to the direction of the grantors, the law would be otherwise; in such case the deed vesting the trust in him, would be the only guide, except in case of mistake or fraud proved in drawing it; but here the utmost precaution was taken to leave nothing to his truth and honesty, or to his discretion; the deed vesting the trust in him, and the deed conveying the lands from him to the several persons for whom it was designed, were prepared and present, and, according to the testimony of the surviving subscribing witnesses, both deeds were signed and sealed before the witnesses were called to attest either, and the witnesses signed them in succession without rising from the table.

A deed duly acknowledged in this country, is often compared to a fine in *England*. In one respect they agree; the interest of a married woman in lands may be passed. The one and the other is also used frequently as part of a set of conveyances used to vest in a husband an interest in lands of his wife, greater than he would otherwise have. And, in such case, the two modes of conveyance are of nearer resemblance. In *England*, a deed declaring the use for which the fine is levied, and to whom and for what estate it is intended to inure, is generally drawn; this may be executed before or after the fine. It was decided in *Berwick's case*, 2 *Co. Rep.* 57, that if husband and wife levy a fine of lands whereof they are seised in right of the wife, and the husband alone declare the uses of the fine, this declaration of the use shall bind the wife, if her disassent do not appear, although her assent to the declaration of the uses cannot appear; for when she joineth with her husband in the fine, it shall be intended, if the contrary cannot appear, that she joined also with him in agreement, in the declaration of uses. And I apprehend that in case of an absolute sale for money, and where the fine is levied in pursuance of a covenant by the husband, this is generally the case; where the fine is levied on a marriage and to settle the order of succession of the estate, a deed to lead the uses is made; for if no such deed and no money consideration has

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passed, the estate after the fine is vested in interest as it was before.

This will give an answer to the objection made here, that the deeds were drawn by the direction of *Charles Thompson*, for although they were, yet as his wife acknowledged, in due form of law, that one which it was necessary should be executed by her, and she being in fact as capable of considering and deciding how her estate should go, as if she were sole; and the second acknowledgment making her in law as capable of disposing of it as if she were sole, the whole is to be considered as the deliberate disposition of an estate by those who had right to it and were capable of making disposition of it.

Lord *Cromwell's* case, also, in 2 *Co. Rep.* 70, is strong to show that where all is done at the same time, and a variance in the deed by trustee from the previous agreement appears, it will be supported on the ground of being governed by the intent of the parties. *Blunt* agreed to convey a manor to *Andrews*, who was to render to *him and his heirs* a rent of £—, with clauses of entry, distress, &c. A fine was to be levied and was levied, and a common recovery, and *Perkins*, the recoveror, conveyed to *Andrews* the manor, and the rent to *Blunt* in tail, remainder over. And among other objections taken was this, that the rents were to have been in fee, and were made in tail with remainder to right heirs in fee; yet, inasmuch as the seisin in *Perkins* was only for an instant, and was but an instrument to carry into effect the intention of the parties, this was held immaterial. The court say the fine is levied of the land, but some variance in the quantity of acres comprised in the fine, or the fine is levied to one of the parties who granteth and rendereth the land, so as there is variance between the covenant and the fine in number and in person, and yet God defend, but that this fine shall be averred to be to the use of the indenture, &c., and that was the case of an absolute sale of the land for money and a rent. How much more reasonable is it that in case of a gift of land, and in which a trustee is raised only for a special purpose, and is trustee but for an instant, that the whole shall be considered as the act of those who had the whole estate, and that their manifest intention shall not be thwarted or prevented on technical rules, by those who had and those who have no right, except from the gift of the grantor. Mrs. *Thompson* had the power to give it to one of them, or to a stranger. She has exercised that power for the benefit of all, though giving unequal portions, and with the portions given each must be contented.

I forbear to enter upon a subject much discussed in this cause, and which is of importance in this state; that is, whether the word heirs means an individual person where there are several in the same situation, or means all who will inherit if the owner in fee simple dies intestate: it is strange that this ever could have been a question in this state since 1683, and stranger that it is still one; but, as the

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point does not arise on the view of the case here taken, and as I may possibly consider this matter differently from others and certainly different from some who have gone before me, and whom I respect most highly, I shall leave it, until some case requires an opinion on the subject.

Judgment reversed.

[PHILADELPHIA, DECEMBER, 1827.]

SAUERMAN *against* WECKERLY.

IN ERROR.

After going to trial on the merits, the court will not reverse the judgment because there is no plea nor issue, and blanks are left for dates and sums in the declaration.

WRIT of error to the Court of Common Pleas of the county of *Philadelphia*.

The plaintiff below and defendant in error, *Conrad Weckerly*, declared against the defendant below and plaintiff in error, *Yerkes Sauerman*, for that whereas the said *Yerkes Sauerman*, on the day of in the year one thousand eight hundred and at the county aforesaid, was indebted unto the said *Conrad Weckerly* in the sum of one hundred dollars, lawful money of the *United States*, for so much money by him the said *Yerkes* before that time had and received to the use of the said *Conrad*; and, being so indebted, he, the said *Yerkes*, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, in consideration thereof, undertook and promised to pay to the said *Conrad* the said sum of one hundred dollars, when thereunto requested, yet the said *Yerkes*, although requested by the said *Conrad* to pay to him the said sum, to wit, on the day and year aforesaid, at the county aforesaid, hath not paid the same nor any part thereof; but the same to pay hath hitherto refused, and still doth refuse, to the damage of the said *Conrad* one hundred dollars: and therefore he brings suit.

To this *narr.* there was neither plea nor issue. The parties went to trial, and the plaintiff below recovered a verdict and judgment.

The plaintiff in error now assigned for errors,

1. That the declaration, which is for money had and received, does not sufficiently state the time when the defendant below was indebted.

2. That the declaration states the *indebitatus*, "on the day of in the year one thousand eight hundred and ," and lays the assumpsit, "afterwards, to wit, on the day and year aforesaid," and also states the request to have been, "on the day and year aforesaid."

(Sauerman v. Weckerly.)

3. That the cause was not at issue in the Court of Common Pleas when it was tried.

4. That to the declaration filed by the plaintiff below, in the Court of Common Pleas, there was no plea, nor any pleadings, but the declaration filed by the plaintiff.

5. The general errors.

Keemle, for the plaintiff in error, cited 5 *Bac. Ab.* 364. 1 *Str.* 641. 2 *Binn.* 33. 4 *Yeates*, 467. 3 *Serg. & Rawle*, 91. 10 *Serg. & Rawle*, 365.

D. P. Brown and *Levy*, *contra*, were stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—Precedents are the highest evidence of the law, and are to be followed implicitly where they do not produce actual injustice or some intolerable mischief. But nothing is stronger than the injustice of suffering a party who has gone to trial without plea or issue, or on a declaration in which there are blank spaces for dates or sums, to elude the consequences. An omission to compel the opposite party to perfect the pleadings beforehand, ought to be considered, what it is in justice and truth, a tacit agreement to waive matters of form, and try the cause on its merits; just as going to trial on a short plea is, according to our practice, a waiver of the right to demand a plea in full form. Where it is the business of a particular class of the profession to attend to the pleadings and prepare the cause for trial, slips are unfrequent, and the injustice of applying strict rules of pleading to cases like the present, is consequently less annoying. But here, where the attorney is also the advocate; where an almost unlimited indulgence is extended to each other by gentlemen of the profession; and where, in consequence, the pleadings are frequently left unfinished, our sense of justice is perpetually shocked by exceptions like the present. From the same spirit of accommodation arose our short entries or memoranda of the substance of the defence, in lieu of pleading at large: yet, according to strict rules of pleading, these short pleas would be bad on demurrer or a writ of error; and it is not a little surprising that this court should have had regard to the circumstances and practice of the profession in the one case, and not in the other. But the discrepancy would be comparatively insignificant, were it not for the insufferable mischief of its consequences in cases where counsel are too frequently instigated by the exigence of the case, to avail themselves of these unimportant errors. The frequency of this at length aroused us to a sense of the necessity of reconsidering our own decisions; intimations of which are to be found in the late reports, particularly in *Carl v. The Commonwealth*, where it is said: “To reverse for a mere formal defect of this sort after a trial on the merits, is a grievance; and, to avoid it, we say once for all, we will lay hold on the most trifling circumstance. Whether we may not even go further when

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we are driven to it by the absence of all pretext, it is at present unnecessary to say." (9 *Serg. & Rawle*, 67.) The alternative, thus spoken of, presents itself in the case before us; and we are, after mature reflection, resolved to disregard such exceptions altogether: consequently, the assignment of error is not sustained.

Judgment affirmed.

[PHILADELPHIA, DECEMBER, 1827.]

KING, Administrator of PERFIRM, *against* CRAWFORD
and another, Executors of CLENNELL.

IN ERROR.

Testator directed that his wife at his decease should have the amount of money remaining in the hands of his executors, to be put out at interest, or in such stock as his executors should think most productive, the whole income thereof to be paid annually to his wife, until T. P. should arrive at the age of twenty-one years; then the said T. P. to have one hundred and forty dollars, and his wife to have the income of the remainder during her natural life. T. P. died before twenty one: *held*, that the legacy lapsed.

WRIT of error to the Court of Common pleas of *Montgomery* county, where a case in the nature of a special verdict was stated, and judgment rendered in favour of the defendant below, and defendant in error.

The suit was brought by *Edward King*, administrator of *Thomas Perfirm*, deceased, against *Joseph Crawford* and *William Hamill*, executors of *William Clennell*, deceased, to recover a legacy of one hundred and sixty dollars, which was claimed under the will of said *William Clennell*, hereafter stated. *Thomas Perfirm* died on or about the first of *October*, 1819, intestate, and a few months under twenty-one years of age.

The testator, *William Clennell*, by his will proved the 3d of *October*, 1815, bequeathed as follows:—

"It is my will, and I do hereby authorize and direct my executors hereinafter named, as soon as convenient after my decease, to make sale of all my property, real and personal, in such manner as they may think proper, and after the payment of all my legal debts, and funeral expenses, the amount of the money remaining in the hands of my executors to be distributed in the following manner, viz: It is my will, and I do hereby direct, that my daughter, *Mary Clennell*, shall, at my decease, have the sum of one dollar. It is my will, and I do hereby direct, that my daughter *Hannah Clennell*, shall at my decease, have the sum of thirty dollars. It is my will, and I do hereby direct, that my daughter *Susan Clennel*, shall at my decease, have the sum of one dollar.

(King, Administrator of *Perfirm*, v. *Crawford* and another, Executors of *Clennell*.)

It is my will, and I do hereby direct, that my wife *Elizabeth Clennell* at my decease, shall have the amount of money remaining in the hands of my executors, to be put out at interest, or in such stock as my executors may think most productive, the whole income thereof to be paid annually to my said wife *Elizabeth* until *Thomas Perfirm*, arrives at the age of twenty-one years; then the said *Thomas Perfirm* to have one hundred and sixty dollars, and my wife *Elizabeth* to have the income of the remainder during her natural life. It is my will, and I do hereby direct, that at the decease of my said wife *Elizabeth Clennell*, my son *William Parker Clennell*, shall have all at his own disposal, &c. It is my will, and I do hereby direct, that *Joseph Crawford*, of the township, county, and state aforesaid, and *William Hamill*, of *Norriton* township, county and state aforesaid, be my executors.

T. Sergeant, for the plaintiff in error.

Rawle, jr., contra.

The opinion of the court was delivered by

HUSTON, J.—Case stated, to determine whether the plaintiff was entitled to one hundred and sixty dollars under the will of the testator, *William Clennell*.

The testator directed all his real and personal estate to be sold, and gave to his daughter *Mary* one dollar, and to his daughter *Hannah* thirty dollars, and then the will proceeds as follows:—"It is my will, and I do hereby direct, that my wife, *Elizabeth Clennell*, at my decease, shall have the amount of money remaining in the hands of my executors, to be put out at interest, or in such stock as my executors shall think most proper, the whole income thereof to be paid annually to my said wife, until *Thomas Perfirm* arrives at the age of twenty-one years, then the said *Thomas Perfirm* to have one hundred and sixty dollars, and my wife *Elizabeth* to have the income of the remainder during her natural life. It is my will, and I do hereby direct, that at the decease of my said wife, my son *William P. Clennell*, shall have all at his own disposal." The defendants were appointed executors, who proved the will and sold the real estate, and have one thousand, two hundred and four dollars and forty-nine cents. *Thomas Perfirm* died under the age of twenty-one.

Cases on the construction of wills are numerous: wills are so much alike, and yet so invariably different in phrase, in situation of the testator's estate, or of his family, that this subjects often to more labour and less certainty to the inquirer, than almost any other in our law. Rules have been laid down, and exceptions to those rules so often established, that the mind is bewildered in the investigation; distinctions have been taken between devises charged on land and those to be paid from personal estate: here is a sum to be paid from a fund raised from both. Distinctions have been suggested

(King, Administrator of *Perfirm*, v. Crawford and another, Executors of Clennell.)

between a devise to a child or grandchild; and one to a stranger; here we are not informed whether the legatee is a stranger or not; from the name and want of any averment to the contrary, perhaps, we must consider him a stranger.

The intention of the testator is to govern, but what was the intention? That *Thomas Perfirm* should have one hundred and sixty dollars, and that his own children should not have that sum: be it so: but did the testator anticipate the death of *Thomas Perfirm*—has he provided for that event? In all cases, the testator intends the sum devised to the legatee, shall go to him; but, in many cases, the intention of kindness is personal; if we are asked here, did the testator know who was next of kin to *Thomas Perfirm*, we cannot answer: did he intend, in case of *Thomas Perfirm's* death, to prefer the next of kin of legatee to his own children?—we do not know. The intention of the testator being unknown, we cannot resort to it.

The situation of the testator's estate and family have been resorted to. The legacy has been supposed vested, and payment only deferred from respect to others; but, as the widow was daily growing older, she would, in ordinary cases, need more to support her several years after the testator's death, than at his death.

Upon a careful review of all the cases, perhaps certain old rules and decisions may be as safely adhered to in this case, as many of the modern exceptions.

"I give to *J. S.* the sum of two thousand pounds, at the age of twenty-one years, to be paid by my executors:" the legatee died at eighteen, having made a will and devised that sum; but it was not recovered by the devisee. *Onslow v. Smith, Eq. Ca. Ab.* 295.

"I give one hundred pounds a-piece to the two children of *J. S.* at the end of ten years from my decease;" the children died within ten years, and the legacy lapsed, and so says the book, in all cases where the time is annexed to the legacy itself, and not to the payment of it. *Snell v. Dee, 2 Salk.* 425. I know no better rule than this. The fund is created, the interest is given to the widow until *Thomas Perfirm* arrives at the age of twenty-one, and then the said *Thomas Perfirm* to have one hundred and sixty dollars: it is not given to him presently, he has no interest in it till he is of the age of twenty-one; it is disposed of until that time—he is not in existence at that time. There is nothing to satisfy me it was intended for his relations, and as it did not ever belong to him, it cannot go to them.

Judgment affirmed.

[PHILADELPHIA, DECEMBER, 1827.]

FRYHOFFER, Administrator of MOYER, *against* BUSBY.

IN ERROR.

The lien of a judgment not revived, expires on the termination of the five years established by the limitation act of 1798, as against another judgment creditor, notwithstanding the death of the debtor before the end of the five years.

ERROR to the District Court of the city and county of *Philadelphia*.

Kittera, for the plaintiff in error.

Fowle, *contra*.

The opinion of the court was delivered by

HUSTON, J.—*William Busby*, the plaintiff below, brought a *scire facias* against *William Fryhoffer*, administrator of *Jacob Moyer*, and a case was stated for the opinion of the court.

William Busby, the plaintiff, on the 11th of *June*, 1818, obtained a judgment against the defendant's intestate for the sum of five hundred dollars; and the above *scire facias* issued on the 10th of *May*, 1823, to *June* term, 1823, on which judgment was entered for the plaintiff, on the report of arbitrators, for three hundred and fifty-six dollars, on the 8th of *November*, 1823. On the 14th of *November*, 1823, the defendant appealed.

William Fryhoffer, *Elizabeth Moyer*, *Susanna Moyer*, and *Sarah Fryhoffer*, severally obtained judgments against the intestate on the 27th of *April*, 1818.

Jacob Moyer, the intestate, died the 12th of *March*, 1823. On the 7th of *August*, 1823, the real estate of the intestate, owned by him at the time of obtaining the judgments, was sold by order of the Orphans' Court, and the amount of the sales are in the hands of the administrator.

If *William Busby* is entitled to a preference over the other judgment creditors above named, in the fund arising from the sale of the estate, there is sufficient in the hands of the administrator to pay him. But if the other judgments above-mentioned, and which have not been revived, have a preference over the plaintiff's, there are no assets in the defendant's hands to pay the same. All the judgments above, bound the real estate of the intestate.

If, upon the foregoing facts, the court shall be of opinion that the plaintiff's judgment has a preference over, and is entitled to be paid out of the proceeds of the real estate of the intestate before the other judgments above named, then judgment is to be entered for the plaintiff for the sum of three hundred and sixty-nine dol-

(Fryhoffer, Administrator of Moyer, v. Busby.)

lars, with interest from the 7th of *June*. But, if the court shall be of opinion that the judgments above named have preference over that of the plaintiff's, and are entitled to be paid first, notwithstanding the same were not revived after the death of the intestate, the judgment is to be entered for the defendant.

The District Court gave judgment for the plaintiff.

This case depends on the enactments of our legislature:—the fourteenth section of the act of the 19th of *April*, 1794, prescribes the order in which the debts of a deceased person shall be paid by his executors or administrators, as far as they have assets:—1st, Physic, funeral expenses, and servants' wages. 2d. Rents not exceeding one year. 3d. Judgments, &c. &c. The cases of *Stewart's Executors v. Wootering*, 3 *Yeates*, and that in 13 *Serg. & Rawle*, have decided in general terms that the same order is to be observed whether the fund for paying the debts arises from the sale of personal or real estate. It has in many cases been said that the order of payment depends on the class of debts to which the claim belongs at the time of the death of the testator, and not on who obtains the first judgment after his death.

The present case presents several creditors, each of whom had a judgment which bound the land of the deceased at his death. Though all judgments, obtained before the death, have a priority to bond and simple contract debts, yet we have no decided case in point, which settles whether the first judgment shall have a preference to the second, and the second to the third, &c., yet, I apprehend it has often been decided. The judgment was no lien on personal property during the life of the debtor, as relates to funds arising from personal property; there is then no ground for preferring one judgment to another; all come in *pro rata*, in case of deficiency of assets to satisfy the whole.

With respect to lands the law is otherwise, each judgment is a lien on the lands of the debtor from the date of its entry on the docket. The first is then entitled to be first paid, where the fund arises from the sale of lands bound by it. This is so in the lifetime of the debtor. But, by the act of the 4th of *April*, 1798, no judgment thereafter to be entered, shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be entered, &c., unless within the term of five years a *scire facias* be issued to revive the same. And the next section prescribes the mode of serving the *scire facias*, as well on the debtor himself as on his executors or administrators, if he is dead. It has been truly said, that the provisions of this act are as plain as they are positive: and, in such case, it is not for the court to inquire whether in any case the law may operate hardly on any individual. If the case comes within the letter and spirit of the law, we have only to say so. It is in effect a statute of limitation. Such laws are necessary, have been

(Fryhoffer, Administrator of Moyer, v. Busby.)

adopted in all civilized countries, and beyond all question are among the most beneficial in the code. If *Moyer*, the debtor, had lived, the lien of each of these judgments would have expired at the end of five years, unless revived severally within the period prescribed by law; and thus no proceeding being had, the lien of the prior judgments having ceased, the latter one would have been let in, and the latter one being duly revived would have had preference. His death makes no difference; the plaintiff, in each of those judgments, was bound to revive it against his representatives, equally as against himself if he had lived. The law says so, and the reason on which the law was founded says so. It is as important that the records should show what is a lien on the lands of a man after his death, as it is that they should show this during his life. At the death of *Moyer* these judgments, (on the case stated,) had a priority to *Busby's*, five years not having expired since the date of their lien; but the five years were suffered to expire by the plaintiffs in those judgments. *Busby* then obtained a preference, which he has preserved by reviving his judgment according to law. The act of 1798 operates on the lien of a judgment not revived by *scire facias* within five years; and, *so far as the fund for payment of debts arises from lands once bound by those judgments*, postpones them to the latter judgment duly revived.

Judgment affirmed.

[PHILADELPHIA, DECEMBER 26, 1827.]

LESHER *against* GILLINGHAM.

Prior to the act of the 24th of *March*, 1827, an amicable agreement to revive a judgment, duly entered on the docket within five years, was a sufficient judgment of revival, as well against subsequent mortgagees, as against the defendant in the judgment.

By virtue of a writ of *venditioni exponas*, issued in this cause, the sheriff sold the real estate therein described, for the sum of one thousand five hundred dollars, and paid the money, after deducting his costs, &c., into court. On the 30th of *July*, 1827, an auditor was appointed to examine and report on the liens, who, on the 15th of *September*, 1827, reported,

That, on the 10th of *May*, 1817, *Stacy Gillingham*, the defendant, executed, to *Isaac Worrell* and *Nathan Harper*, a bond conditioned for the payment, in one year, of nine hundred and fifty dollars, with lawful interest; and, to secure the payment thereof, executed a mortgage, bearing the same date, to the said *Isaac* and *Nathan*, upon a message or tenement, and lot or piece of ground, situate in the borough of *Frankford*, in the county of *Philadelphia*,

(Leshar v. Gillingham.)

which premises the said *Isaac Worrell* and *Nathan Harper*, by deed poll, bearing even date therewith, had granted to the said *Stacy Gillingham*. This mortgage was not recorded until the 13th of *April*, 1819.

On the 27th of *February*, 1819, *Stacy Gillingham* executed to *Jacob Leshar*, the plaintiff, a bond conditioned for the payment of one thousand six hundred dollars, in one year, with interest. On the 8th of *April*, 1819, judgment was entered, by confession, on the bond, in the Supreme court to *March* term, 1819. On the 16th of *January*, 1824, an agreement was entered into, between *J. Y. Castor*, Esq., attorney for the plaintiff, and *Stacy Gillingham*, the defendant, whereby it was agreed that judgment should be entered for the plaintiff, in an amicable action of *scire facias*, to revive the preceding judgment, as though a writ had been regularly issued, and returned "*made known*." An amicable action of *scire facias*, to revive the judgment, was accordingly entered on the docket to *March* term, 1824, No. 12, and judgment was entered for the plaintiff, for the sum of sixteen hundred dollars, with interest from the 27th of *February*, 1823.

On the 1st of *May*, 1826, a *scire facias quare executio non* issued on this judgment, to *July* term, 1826, which was returned *nihil*.

To *December* term, 1826, an *alias scire facias* was issued, which was also returned *nihil*.

A *fieri facias*, issued to *March* term, 1827, and a *venditioni exponas*, to *July* term, 1827, by virtue of which the real estate of the defendant was sold, and produced the sum of eight hundred and fifty dollars.

Other incumbrances existed on the real estate of the defendant, but none prior, in date, to the above.

If the original judgment of *Leshar* has been duly revived, he is entitled to the whole of the fund in court, and the auditor is of opinion that the spirit of the act of assembly, and the common practice under it, which seems to have been countenanced by many decisions of the court, justify him in regarding an amicable agreement to revive a judgment, duly entered on the docket within five years, as a sufficient judgment of revival, as well against a subsequent mortgagee, as against the defendant in the judgment, and reports that *Jacob Leshar*, the plaintiff, is entitled to the money in court.

To this report the following exceptions were filed:

1. The auditor erred in reporting that an amicable agreement to revive a judgment, duly entered on the docket within five years, is a sufficient judgment of revival, as well against a subsequent mortgagee, as against the defendant in the judgment.

2. The auditor erred in reporting that *Jacob Leshar* is entitled to all the money in court, and should have reported that *Isaac Worrell* and *Nathan Harper* are entitled to receive eight hundred and fifty dollars, the amount for which the property mortgaged to them was sold.

(Leshar v. Gillingham.)

A. Randall, in favour of the exceptions, referred to the *Act of Assembly*, *Purd. Dig.* 391, which is positive that a *scire facias* must issue: the act directs the service and the form of the judgment. 3 *Binn.* 342.

This would certainly not be good against purchasers who are entitled to notice.

Castor, contra.—This has been a common mode of revival, and many titles depend on it. 1 *Peters*, 438. A practice may even control an express rule of law. An amicable action answers every intent of a *scire facias*. The decisions of the several inferior courts have uniformly sustained this mode.

Chauncey, in reply.—Judgment creditors were to be protected, *a fortiori* mortgagees. He may have made his arrangement with the terre-tenant, to be informed of the writ. When he takes his security, he does so by searching the records. 13 *Serg. & Rawle*, 145. This matter is now altered by the act of the 26th of *March*, 1827, *Pamp.* 129; so that it can be revived by agreement of parties and terre-tenants.

The opinion of the court was delivered by

ROGERS, J.—The precise question, raised in this case, has not heretofore been the subject of judicial investigation,—whether an amicable agreement, to revive a judgment duly entered on the docket within five years, is a sufficient judgment of revival, as well against a subsequent mortgagee, as against the defendant in the judgment. The facts are fully set forth in the case stated. A *dictum* of one of the Presidents of the Courts of Common Pleas, in relation to the construction of the act of the 4th of *April*, 1798, caused some alarm in the state, as the practice had prevailed to revive judgments by amicable action; and it was understood that a considerable amount of property depended on the regularity of the proceeding. Undoubtedly, as between the parties themselves, an amicable action continues the *lien*; for a defendant has a right to waive a *scire facias* and confess judgment, to avoid the expense and trouble of an adverse suit, and this independently of the act passed at the last session of the legislature. Although the preamble of the act speaks only of purchasers of real estate, yet it has been held in *The Bank of North America v. Fitzsimons*, 3 *Binn.* 342, that a judgment, not revived by *scire facias*, within five years from its date, ceases to be a lien on real estate, as well against subsequent judgment creditors, as against subsequent purchasers. In the case in *Binney*, no *scire facias* was ever issued, nor even any steps taken to continue the lien of the judgment. It would be too much to insist, that when an amicable action had been entered, and judgment obtained, it could be treated so far a nullity, as to let in subsequent purchasers, or judgment creditors, or mortgagees. It would be contrary to the equity and intent of the statute; for they would not be within its protection, which was intended to prevent the risk and inconveni-

(Leshner v. Gillingham.)

ence to purchasers of real estate, by suffering judgments to remain, for an indefinite length of time, without any process to continue or revive the same. The object of the act is to give notice of the existence of the debt, which is as effectually done by an amicable action, as by a strict pursuance of the direction of the statute. If this be so, the judgments *mesne*, between the original judgment and revival, are in no better situation. They do not give credit to the defendant, on the faith of their being no lien against him. On the contrary, they are well aware that such liens exist. The act is not intended to protect their rights, but they are left to their remedy at common law. If judgments are kept on foot, by fraud or collusion, the remedy is open to creditors, by application to the court, who, on proper proof, will open the judgments, and let the creditors into a defence. That purchasers were principally in the view of the legislature, appears as well from the preamble as the third section, which directs service of the writ on the debtor or his representatives, and on the terre-tenant, a person occupying the real estate bound by the judgment. It does not extend to a judgment creditor or mortgagee, who are not in the actual possession of the premises, as it was intended for the special benefit of the alienee, giving him an opportunity, on the *scire facias*, of investigating the claim, and showing the judgment invalid or paid. It has been contended, that a mortgagee stands in the situation of the terre-tenant, and is entitled to notice. This has neither been practiced, nor does it, in my opinion, come within the words or spirit of the act. A mortgage is a mere security for a debt, and the mortgagee, so far as respects this question, is in no better situation than judgment creditors.

Report confirmed.

[PHILADELPHIA, JANUARY 17, 1828.]

LEVY *against* CADET and another.

After the dissolution of a partnership, one partner cannot, by his acknowledgment, revive a partnership debt, so as to deprive the other partner of the benefit of the act of limitations.

MOTION, for a new trial on behalf of the defendants, in a suit brought by *Levy* against *Cadet* and *Hipple*, in which a verdict was rendered for the plaintiff.

This suit was brought on the 20th of *July*, 1824, on a promissory note, dated the 26th of *May*, 1816, payable sixty days after date. *Cadet* and *Hipple*, who were partners, were the drawers; *Levy* was the payee of the note: *Cadet* suffered judgment by default, and *Hipple* pleaded *non assumpsit*, and *non assumpsit infra sex annos*.

(Levy v. Cadet and another.)

On the 4th of *June*, 1816, the defendants made a general assignment, and on the 11th of *October*, 1816, *Cadet* was discharged as an insolvent, and returned the plaintiff as one of his creditors on the note. On the 17th of *October*, 1816, a majority in number and value of *Cadet's* creditors signed an agreement to discharge his property for seven years; and, on the 7th of *November*, 1816, the court made an order, under the 14th section of the act of the 26th of *March*, 1816, releasing his property for seven years. At the trial, *Cadet* made an unqualified acknowledgment of the debt, and at the same time declared it had not been paid. The question was, whether the acknowledgment of *Cadet* took the case out of the act of limitation against *Hipple*.

Phillips, for the plaintiff in error, contended, 1. That the statute began to run only from the expiration of the seven years. *Purd. Dig.* 363. 2 *Serg. & Rawle*, 280. 9 *Serg. & Rawle*, 142.

2. The acknowledgment of one of the partners after the six years takes the case out of the statute against both. *Chitty on Bills*, 479, (*Carey's Ed.* 1821.) 2 *Doug.* 651. 2 *H. Black.* 340. 3 *Campb. N. P.* 31. 6 *Johns.* 267. 2 *Bay*, 533. 1 *Taunt.* 103. 6 *Johns.* 267. 15 *Johns.* 3.

Atherton and *Binney*, *contra*, argued, 1. That nothing will stop the statute after it has commenced. It was running at the suspension of the right to sue *Cadet*. The twelfth section of the act makes provision for this very case.

2. There is no power in the partners to bind each other after dissolution of the partnership, and the expiration of the six years. They cited 3 *Esp.* 108. 2 *Johns.* 300. 3 *Johns.* 536. 4 *Johns.* 224. 1 *H. Black.* 155. *Watson on Part.* 209. *Gow*, 337. 15 *Johns.* 409. *Id.* 224. 5 *Binn.* 573. 11 *Johns.* 146. 2 *Barnw. & Cressw.* 12. 1 *Barn. & Cressw.* 248. 2 *Vent.* 151. 8 *Cranch*, 72. 9 *Serg. & Lowber*, 12. 8 *Serg. & Lowber*, 67. 1 *Barn. & Ald.* 463. 7 *Price*, 193. 1 *Barnw. & Cressw.* 50. 1 *Taunt.* 104. *Gow*, 310, 312. 16 *Ves.* 57. 11 *Ves.* 5. 2 *Const. Rep.* 685. 1 *McCord*, 179. 1 *Barnw. & Ald.* 467.

J. R. Ingersoll, in reply, cited 1 *Mod.* 245. 4 *Binn.* 375. *Gilb. Ev.* 51. 9 *Serg. & Rawle*, 416. 2 *Bing.* 306. *Burham v. Raynall*, 3 *Munf.* 191. 2 *Hawk.* 209. 2 *Bay*, 533. 1 *Hayw.* 20. 4 *T. R.* 576. 16 *East*, 420. 11 *Johns.* 146. 2 *Burr.* 1099. *McCord*, 190.

The opinion of the court was delivered by

ROGERS, J.—If this question were *res integra*, the court would have no difficulty. The construction of the statute of limitations is embarrassed with decisions, (from an indisposition in courts of justice of former times to carry its wholesome provisions into effect,) which it would be a hopeless task to endeavour to reconcile. An attempt to do so would confuse, rather than elucidate, the point now under review, which in *Pennsylvania* is new, and of some interest. In the modern cases, the statute has been considered as

(Levy v. Cadet and another.)

entitled to some respect, and not to be explained away. With this disposition, I approach the point raised on the record.

The act of assembly provides, that the action shall be commenced within six years next after the cause of action, and not after. The statute bars the remedy, but does not extinguish the debt. The debt remains *in foro conscientiae*, as obligatory after the expiration of the six years as before: hence it is, that the indebtedness has always been considered a good consideration for a new promise. We shall be greatly assisted in our inquiries, in the first place, by ascertaining in what manner in *Pennsylvania*, a case is taken out of the act of limitations. There must be a new promise, either express or implied, to have this effect. The acknowledgment of the debt does not take the case out of the act, but it is a fact from which a new promise may be inferred; and for this we have the authority of the Supreme Court, in the leading case of *Jones v. Moore*, 5 Binn. 573. The Chief Justice, in delivering the opinion of the court, has investigated all the cases, and has deduced the principle to which I have just referred, which has since been considered as text law in this state. The fact of a new promise is left as any other fact to the jury, with directions from the court to infer a promise, unless there is something in the evidence from which a contrary inference must be drawn. It is a legal presumption, which, without more, the jury are not permitted to disregard. The inquiry always is, whether there is sufficient evidence of a new promise to pay, and, without it, the plaintiffs are not entitled to recover, whatever opinion the jury may have formed as to the payment, or actual discharge of the debt. It is to be regretted that this salutary rule has been departed from; for, by keeping it steadily in view, much difficulty, with which we are continually embarrassed in the construction of the act, would have been avoided. A strict adherence to principle would have put the party to his suit on the new promise, would have prevented a recovery on the old pleadings, and would have rendered incompetent the proof of a promise after the commencement of the suit. It is now understood, that the plaintiff may declare on the original cause of action, although he relies on the new promise. Without multiplying authorities, it may be sufficient to observe, that the whole current of cases in *Pennsylvania* are in accordance with these principles, for the case of *Jones v. Moore* has never been questioned. It remains, then, to inquire into the power of a partner after the dissolution of the partnership. Whenever a partnership is dissolved, the object of the association is terminated, and nothing remains to be done, except the arrangement of the affairs of the partnership; and until they are settled, as between the parties, the partnership may be said to continue. Engagements may be contracted, which cannot be fulfilled during its existence, exposed as partnerships are to sudden and extraordinary terminations. For the purpose, therefore, of making good outstanding engagements, the partnership

(Levy v. Cadet and another.)

must, in legal contemplation, have a continuance, although, as between the parties themselves, it is actually determined. *Gow on Part.* 212. Beyond this, the power of former partners to bind each other does not extend. After the dissolution of the partnership, they are not the agents of each other, except for the purpose of making good outstanding engagements. They cannot enter into a new contract, or engagement for their former partner. They have no authority, either express or implied, for any such purpose, nor does necessity or public convenience require that they should. They become so disunited in interest, that the one cannot by any contract or engagement implicate the credit of the other. *Gow on Part.* 310. "The authority," say the court in 4 *Johns.* 227, "which exists during the continuance of a partnership, for one partner to bind his co-partner, ceases on its dissolution. Again, in 3 *Johns.* 538,—“After the dissolution of a co-partnership, the power of one partner to bind the other wholly ceases.”

In many, and indeed in most cases, one of the partners is by agreement exclusively authorized to arrange their joint affairs, and to receive the partnership credits, as the fund out of which to discharge the partnership debts. The other partner, in many cases, is ignorant of the details of the business; particularly when he is acquainted with, and satisfied with the result. It would be dangerous to say, that, under such circumstances, his acknowledgment should charge the former partner; for it is to be remembered, that the statute was not enacted to protect persons from claims fictitious in their origin, but from ancient claims whether well or ill founded, which may have been discharged, although the evidence of discharge may have been lost. 8 *Cranch*, 74.

After settlement of the accounts, many persons become careless of their vouchers, which may be lost by time, or accident. To expose persons, in such situations, to the risk of being saddled with debts at an indefinite length of time, which may have been discharged, by the acknowledgment of a person ignorant of the fact of payment, or from insolvency, and perhaps malice, reckless of the consequences, is a principle which I am unwilling to sanction. Persons so exposed are those whom the statute was intended to protect. It gives them a shield, of which they cannot be deprived without their own consent. We cannot have a stronger illustration of the propriety of the rule than is presented by this very case. The solvent partner, *Hipple*, claims the protection of the act; it is the insolvent, *Cadet*, who not only wishes to waive the benefit of the act for himself, but for *Hipple* also. Whether the debt has been paid, I know not, nor is it material. It is sufficient for me, that the six years from the time the action arose, has expired, and that *Hipple* has neither promised to pay the money, nor has he made any acknowledgment, from which a promise may be inferred. On the contrary, he claims the protection of the statute; and, in the opinion of the court, he is entitled to its benefit. We

(Levy v. Cadet and another.)

have carefully examined the cases cited in the argument, all which, whether in *England* or in sister states, have been brought by the research of counsel in review before us, and, although entitled to great respect, as evidence of the law, are not authority here. However differently settled elsewhere, (which does not distinctly appear,) yet, in *Pennsylvania*, in carrying out the great leading principle of the statute of limitations, we come to the conclusion that one partner cannot, after the dissolution of the partnership, bind the other, so as to deprive him of the benefit of the act. It will be observed, that we do not place the question on the fact that the promise was made after the six years had expired, but on the general principle, which, in the opinion of the court, covers the whole ground.

It may be sufficient to observe, that the remaining points have been considered, and that they do not avail the plaintiff.

New trial awarded.

[PHILADELPHIA, JANUARY 17, 1828.]

STARRETT, by his Guardian LIGGETT, *against* WYNN and another.

IN ERROR.

If a husband deserts his wife and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion are her separate estate, and she may dispose of them by will or otherwise.

WRIT of error to the Court of Common Pleas of *Chester* county.

This was an action of trespass, brought by the plaintiff in error, *William Starrett*, to recover damages for certain personal property seized and sold by *John Wynn*, one of the defendants in error, as a constable under an execution at the suit of *Joshua Evans*, the other defendant in error, against a certain *Reuben Starrett*.

The property in question once belonged to *Reuben Starrett*, but had been sold under an execution at the suit of his sister, *Mary Starrett*, bought in for her, and by her will left to the minor plaintiff, a son of the same *Reuben*.

On the part of the defendants it was, amongst other things, contended, that *Mary Starrett* was a feme covert, and actually intermarried with one *Samuel Gibson* at the time of making the will: that the will was therefore void, and conveyed no right to the plaintiff.

On the first trial the fact of marriage was controverted by the plaintiff, and a verdict obtained in his favour for three hundred and twenty-five dollars.

(Starrett, by his Guardian Liggett, v. Wynn and another.)

This verdict having been set aside, and a new trial granted, on the last trial, the fact of a marriage having taken place, was not controverted by the plaintiff, but evidence was adduced on his part to show, that the husband from the time of the marriage, in *November*, 1812, up to the death of the said *Mary Starrett*, in 1821, had never co-habited with her a day; that he abandoned her immediately, and enlisted as a common soldier shortly after; married another woman in *Canada*; never contributed to her support, nor placed property in her possession, nor interfered with her estate: that from the time of the marriage to her death, she had the entire control of her property, and that property derived from sources independent of her husband, principally before coverture; that she did not assume the name of her husband, but brought suits and transacted business in her maiden name, and was generally recognised and called by that name among all her acquaintances; that the said husband had resided for several years in *Philadelphia* with another woman, followed wood-sawing, and had never interfered with the execution of the will, or made any claim to the property; and it was contended, on behalf of the plaintiff, that property held under such circumstances would be regarded in chancery as the separate estate of the wife, which she had a right to dispose of by will, independent of her husband: also, that the conduct of the husband, after her death, went to show an affirmance of the will by him. The court was therefore requested, by the plaintiff's counsel, to charge the jury as follows:—

“1. If the jury believe, from the facts in this case, that *Samuel Gibson* abandoned or relinquished the rights which his marriage gave him over the property of his wife, she had a right to dispose of such property by will. And there is evidence in the cause, for their consideration, going to establish this point.

“2. In order to establish the right of separate property in the wife, it is not necessary to prove a *contract* or *agreement* between husband and wife, nor the intervention of trustees; but it may be acquired by gift, voluntary consent, or such a total abandonment as will warrant the inference of his assent.

“3. The will of *Mary Starrett*, even though a separate property is not proved, may be affirmed by the acts of her husband.

“4. The conduct of *Samuel Gibson*, both before and since the death of his alleged wife, as proved in this cause, goes to show his assent to her right to dispose of this property by will: and, if the jury believe he did so assent, it is not competent for a mere stranger to say it is void.”

Upon these points, the court charged,—

“1 and 2. The control of the husband over the personal property of his wife, during coverture, is an important, positive, and well established right; a right of which he cannot be deprived but by his own act and agreement. He may agree that his wife may hold and enjoy as her separate property, notwithstanding her coverture;

(Starrett, by his Guardian Liggett, v. Wynn and another.)

and over such property she will have the absolute control, to dispose of as she pleases, either in her lifetime, or by will at her death. This agreement, that the wife shall hold separate property, may be in various shapes, by the husband, or between the husband and wife, before or after the marriage, and with, or without the intervention of trustees. But it is essential that the husband should do some act, he must make some agreement or arrangement to part with the control or dominion over the property, which by law belongs to him, and vest it as separate property of the wife; and this may be proved, like all other facts, either expressly, or by circumstances. If there exists any evidence in this cause of such an act or agreement of the husband, either expressly or circumstantially, it would be laid before, and left to the jury. But I am of opinion that there is none. We are not to infer an agreement that the wife shall hold property to her separate use without any interference or control on the part of the husband, from circumstances of another character, which may or may not exist with or without such an agreement on the part of the husband. I am of opinion that the circumstances of living separate from the wife, or deserting her and contributing nothing to her support, and the other facts relied on in this cause, do not entitle the jury to infer an agreement of the husband, that the wife should enjoy the property in question to her separate use.

“3 and 4. The will of *Mary Starrett*, (*Gibson*,) even though a separate property is not proved, may be affirmed by the husband; but there is no act of assent to this will by *Samuel Gibson*, in any shape in evidence before the jury—mere silence is insufficient.”

The plaintiff excepted to this opinion.

Bell and Tilghman, for the plaintiff in error.

Dillingham and Chauncey, contra.

The opinion of the court was delivered by

ROGERS, J.—The testimony would have justified the jury in finding, that *Mary Starrett* had been abandoned by her husband, *Samuel Gibson*. The fact of abandonment as being found by the jury, raises a question of some novelty, as well as of great importance to feme coverts, whether property acquired during the time of the desertion, can be disposed of by the wife, by will, or otherwise. In other words, is property acquired under such circumstances separate estate, and, as such, subject to her disposition? It is conceded, that the control of the husband over the personal property of the wife, during coverture, is an important privilege, and well established right, of which he cannot be deprived, but by his own act or agreement. The acquisitions of the feme covert, inure to the benefit of the husband, as when a bond is given to the wife, he may sue alone. A gift or legacy to the wife, and even the rewards of her personal labour, during coverture, vest in the husband, and he may release them. As the law imposes the

(Starrett, by his Guardian Liggett, v. Wynn and another.)

obligation of maintaining the wife, and also endows her, it is but reasonable that he should have the advantages which arise from the relation of marriage. But, although these are conceded as general principles, yet the exigencies of society, and experience, have introduced several exceptions. Thus, when a husband is exiled, his wife is permitted to sue in her own name. *Co. Litt.* 132. n. So, also, when the husband has abjured the realm, in such cases, she is permitted to claim her land, without her husband, and is exempted from the disabilities of covertures. She may maintain trespass, may sue for her jointure, and may also be sued as a feme sole. And, as in the case of *The Countess of Rutland*, against *Rodgers*, she may make a will, and may, in all things, act as a feme sole, and as if her husband was dead, and this from the necessity of the case. These cases, which are put by way of example, show the great relaxation which has taken place from the rigidity of the ancient rules, which are relaxed from necessity, or where the reason of the rule has ceased to exist. The question, then arises, when the husband has abandoned his wife, separated from her, without affording her support, does his marital right still continue so as to give him an absolute property in her acquisitions. Unless some positive rule of law intervenes, policy and humanity would require, that, as he has cut himself loose from the duties, which the relation of marriage imposes, he shall not be allowed its advantages. His conduct would amount to a virtual surrender of his rights. Why should she not be permitted, by industry and management, to acquire property for herself and family? Why should she be liable to plunder, at the will and pleasure of a brutal and unfeeling husband, who, perhaps, has deserted her without cause, and returns for the purpose of seizing on her hard earnings? A husband goes off with an adulteress, and continues absent for years; in the mean time, the wife, by industry, and the assistance and compassion of friends, acquires property, and she disposes of it by will, which the husband endeavours to wrest from the objects of her bounty. Such cases have, and will again arise, and it should be an unbending principle of law, which would sanction such injustice. It is said, that she may obtain a divorce: but why should we compel a woman, deserted by her husband, to sue for a divorce? Although abandoned, they do not always cease to cherish an affection for a worthless husband; besides, some wives are principled against divorces, nor should they be compelled, in order to avoid injustice, to resort to such a remedy. They are sometimes stimulated to exertion, by a hope, that the acquisition of property may be a mean of reclaiming the husband, or, at least, in case of a subsequent union, of preventing ill treatment.

It is granted, that a husband may by express or implied agreements, renounce his marital rights, and vest property acquired by the wife as her separate property, and this where the husband is in

(Starrett, by his Guardian Liggett, v. Wynn and another.)

the strict performance of all his duties. Thus, in *Slanning v. Style*, 3 P. Wms. 338, a husband, voluntarily, and after marriage, allows his wife, for her separate use, to make profit of all butter, eggs, pigs, poultry, and fruit, beyond what is used in the family, out of which the wife saves one hundred pounds, which the husband borrows, and dies; the court will allow this agreement to encourage the wife's frugality, and the wife shall come in as a creditor for the one hundred pounds. So, also, in *Calmedy v. Calmedy*, cited and approved of in *Slanning v. Styles*,—where the husband agreed that the wife should take two guineas of every tenant that renewed a lease with the husband, the fine which the husband received, this was allowed to be the wife's separate money. So, also, in *Magrath v. Roberts' Administrators*, a wife may become a sole dealer, or trader, by permission of her husband, even without deeds, and she may become entitled to all her earnings, as her separate estate. But it is said, that here there is neither an agreement express or implied. To which it may be answered, that it cannot be supposed that the husband intends his wife to starve; and, as he has voluntarily withdrawn his support, it is a fair presumption that he has consented to her using her own exertions to maintain herself. But whether this be a strained presumption, it is immaterial to inquire, as the court are of opinion that the desertion of the husband, and a cessation of his wonted duties, vest a separate property in the wife, in the acquisitions made during the time of the desertion. Nor does this opinion rest altogether on abstract reasoning. It has the benefit of an express decision, in which the principle we have been supporting is fully recognised. *Cecil and Wife et al. v. Juxon et al.* 1 Atk. 278. The defendant, *Emanuel Juxon*, some few years after his marriage, left his wife and two small children, and went abroad, and did not see them for fourteen years; the wife's mother, during this time, intrusted her with millinery and other goods, and permitted her to maintain herself and children out of the profits. The husband, upon his return, breaks open the wife's house, and takes away all her goods, and produce of the stock so lent as aforesaid. The bill was *inter alia* brought for the re-delivery of the goods. The court decided, that what the wife has acquired in her husband's absence to subsist herself and family, is her separate property, and is not liable to the disposition of the husband. Sir JOSEPH JEKYLL, in delivering the opinion of the court, says, that as the desertion of the plaintiff, *Emanuel Juxon*, was fully proved, the court would look upon any thing acquired by the wife in his absence, for herself and family to subsist upon, as her separate property, and not liable to the disposition of the husband, when he should please to come home and plunder her, and therefore declared that the plaintiff, *Mary Juxon*, was entitled to the goods that were in her possession, and also to the stock in her separate trade, before the same were taken away by the defendant for her separate use.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY 17, 1828.]

The COMMONWEALTH against GENTHER.

IN ERROR.

The inspector of beef is entitled to the fee of a shilling for each cask repacked, whether in the course of his ordinary duties or otherwise.

But a charge for coopering is allowed only where the cask was originally defective, not for merely replacing the head.

It seems, an officer cannot withhold his services till he receives his fee: nor divide an act of duty into several parts so as to make separate charges of less than forty shillings in order to preclude the right of appeal.

Indictment for misdemeanor lies against an inspector of provisions for refusing to perform his duty.

THE defendant was inspector of salt provisions for the city and port of *Philadelphia*, and was charged in an indictment for misdemeanor, in various counts.

The 1st count was, refusing to *inspect and brand eighteen barrels* of beef for *Charles Pray*, having been previously tendered his lawful fees of one dollar and forty-four cents.

2d. Same charge, without stating the *amount* tendered; but, *generally*, that a tender of lawful fees was made.

3d. Refusing to *brand*, and tender alleged of one dollar and forty-four cents.

4th. Same charge, stating the tender generally of lawful fees.

5th. and 6th. Refusing to *inspect* and refusing to *brand*.

7th. Refusing to brand *and inspect* forty-two barrels, and three dollars and thirty-six cents tendered.

8th. Same charge, and *no amount* tendered.

9th. Same charge, without tender.

10th. Refusing to *brand* forty-two barrels, and three dollars and thirty-six cents tendered.

11th. Same charge, and *no amount* tendered.

12th. Same charge, and no tender.

13th. Was called on to brand, &c., forty-two barrels, and did so in part, but would not complete the examination, inspection, and branding.

On the trial, *Charles Pray*, the prosecutor, swore that in *December*, 1826, he sent for the defendant to come and inspect forty-two barrels of beef, he being a victualler, and the defendant the inspector. The defendant's deputy came, with his assistant, and opened ten out of the forty-two barrels: their usual practice was to open one in ten. They said they were fully satisfied, and that all it wanted was the *Philadelphia* brand, provided witness would pay them for it. They made out a bill of five dollars and twenty-five cents for twenty-four barrels, to keep the matter within the forty shillings law. Witness told them he wanted the forty-two barrels done, and would pay for the whole directly. The deputy said his instruction was to go no further, and they would give wit-

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ness the forty shillings law. At that time they commenced branding the twenty-four barrels, and the defendant, *Genther*, came in, eighteen of the forty-two barrels being unbranded. The deputy said, *Pray* will not pay us this bill for the twenty-four barrels. Witness said he would pay if they would finish the job, and offered the money to *Genther*, six dollars in notes, to which he made no objection. He refused, and said unless witness paid the first bill he would go no further; and they went away. Two months ago witness sold the beef at a loss. He afterwards asked the defendant what was his fee: he said eight cents a barrel. Witness asked how much for forty-two barrels: he said three dollars and thirty-six cents. Witness tendered it in silver, and asked him to finish the job. He said he would not until he paid the repacking and coopering on the first, being five dollars and twenty-five cents. Witness told him he had his remedy for that, and asked him what he would charge for the remainder: he said one dollar and forty-four cents. He tendered it, but he said he would not brand them unless he paid the first. Witness's intention was all along to pay, and prosecute for the penalty. The bill he tendered was for repacking and coopering. On former occasions he had refused to pay such a charge. He agreed to enter into an amicable action, to have the point determined by the Supreme Court. He refused, and said he would give witness the forty shillings law.

The defendant's witnesses did not contradict the material facts sworn to. One of them stated that *Pray* asked the defendant if he would do the work, and he said if he would pay that bill he would go on; otherwise not. *Pray* said *go and do the work and then I will pay you*.

His Honour charged the jury, that the defendant had taken three grounds of defence; namely, that the subject matter was not indictable; that the defendant was entitled to the fees demanded; and, that he was not bound to perform his duties without tender of the fees.

The first ground entirely fails. The second was the main point; but it would be unnecessary to express an opinion on it *here*, as the defendant had not a right to insist on payment of fees before they were earned: certainly not to split up one job into several, with a view to create separate demands. On this ground the case is clearly against him. But the defendant was not entitled to the fees charged.

The jury found a verdict of guilty, and the defendant moved for a new trial.

Goodwin and *Mahany*, in support of the motion.

Brewster and *J. R. Ingersoll*, *contra*.

The opinion of the court was delivered by

GIBSON, C. J.—In one respect I am satisfied that the opinion I entertained at the trial is erroneous. In the act of 1727, which is

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in pari materia, the several parts of the business of inspecting, (which were compensated collectively, but for one of which a fee is now given specifically,) are enumerated and described so as to include repacking, which is one of the very duties for which extra compensation is claimed here. Hence it seemed that this service was entitled to be separately compensated only where it should not constitute a part of the ordinary business of inspection: as where the article or the casks should be defective, and repacking should be incidental to the process of rendering the whole merchantable. But it escaped me that for what was called inspecting, very nearly the same fees were allowed then, as are allowed for inspecting and other services which are distinguished from inspecting, now, and compensated separately. The reason of the alteration is obvious. In the origin of the system, it was supposed that each cask would have to be opened; so that the amount of service actually rendered, being in all cases determinable by the number of the casks, would be not only conveniently, but justly compensated by allowing the same fee for each. But, when experience had shown actual inspection to be necessary only in respect of an inconsiderable number, it was found to be manifestly improper to compensate services which were never rendered, by allowing a fee for repacking in respect of casks which were only branded. Hence a fee for inspecting was given for each, as each was to be branded; and compensation for repacking was allowed only where it should be earned by actual performance of the service. The officer is therefore entitled to a shilling for each cask repacked, whether in the course of his ordinary duties or otherwise.

But it is equally clear that replacing the head and the hoops, and securing them with nails, is a part of the business of repacking; and that a charge for coopering can be allowed only where the cask, having been found defective, has been rendered otherwise by services which none but a cooper could render. To replace the head does not require professional skill. The inspector or any one else can do it as well as a cooper. But what puts the intention of the legislature beyond a doubt, is the leaving of the amount of compensation to be determined by the extent of the services. The trouble of replacing the head, being in all cases the same, is, more than any other duty appertaining to the office, susceptible of just compensation by a specific fee; and, had it been intended to be made the subject of a separate charge, it is reasonable to infer that a specific fee would have been provided for it; while, on the other hand, an indefinite compensation is referrible only to services whose extent must necessarily depend on the circumstances of the particular case.

How does this affect the propriety of the verdict? The facts are not disputed; and, unfortunately for the defendant, these put the question of criminality beyond dispute. Granting the propriety of the fee for repacking, yet he insisted on other charges that

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are altogether inadmissible. And, even were this otherwise, still I am not willing to admit the right of an officer to withhold his services till he shall have received his fee; nor that he can, as was attempted here, divide an act of duty into several parts so as to make separate charges of less than forty shillings each, and thus elude the right of an appeal in an action before a justice of the peace. He might, with equal reason, make a separate charge for each cask, and subject those who employ him to ten times the amount in costs incurred in vexatious lawsuits, and thus convert his office, which was created for public convenience, into an instrument of public annoyance. For these reasons, we are of opinion the defendant is guilty of the misdemeanor charged in the indictment.

Rule discharged.

[PHILADELPHIA, JANUARY 17, 1823.]

BROWN and others *against* SIMS and another.

The goods of a third person placed in the way of trade on storage in the warehouse of one who used the trade and business of a merchant, and received goods and merchandize from merchants and traders on storage, are not liable to distress for rent for such ware-house, though found on the premises.

REPLEVIN by *Josiah Brown* and others, against *Joseph Sims* and *John M. Masters*, for twenty-six hogsheads of tobacco. The defendant *Sims*, avowed, and the defendant *M. Masters*, made cognisance of the taking, as a distress for rent of certain ware-houses and stores in the city of *Philadelphia*, due by one *Joseph Lea*, the same being found on the premises.

The plaintiffs pleaded no rent in arrear; and for further plea, that they, the said plaintiffs were then, to wit, at *Philadelphia*, in the county aforesaid, commission merchants and factors, and carried on the business of commission merchants and factors, and bought and sold goods, wares, and merchandizes, as commission merchants and factors for others, upon commission, and that they did then and there receive the said twenty-six hogheads of tobacco from certain persons residing abroad; to wit: ——— of ——— to sell the same as the factors or commission merchants of the said ——— for and upon commission, and that the said *Joseph Lea* was the tenant and occupier of the said stores and warehouses, in which, and under a demise from the said *Joseph Sims*, for a term of years, at the annual rent of fifteen hundred dollars. That the said *Joseph Lea*, during such his occupation of the premises, used and followed the trade and business of a merchant, and received goods, wares and merchandizes, from merchants and traders on storage, in the way of his said trade, and therefore used the said

(Brown and others v: Sims and another.)

premises in the way of his said trade and business, to store goods, wares and merchandizes, so placed upon the premises; and that the plaintiffs put and placed the said goods, to wit, the twenty-six hogsheads of tobacco, so sent to and received by them to sell upon commission as aforesaid, in the said stores and warehouses, on storage, with the said *Joseph Lea*, in the way of trade and business, and the said *Joseph Sims* and *John M^cMasters* took their said goods, to wit, the said twenty-six hogsheads of tobacco, as a distress due to him the said *Joseph Sims*, from the said *Joseph Lea*, at the same time when, &c. of their own wrong, in the said place in which, &c., and unjustly detained the same, &c.

To this special plea the defendant demurred, and the plaintiffs joined in the demurrer.

Binney, in support of the demurrer.

If taking goods on storage be sufficient to exempt, no landlord of stores in *Philadelphia* has the security of distress. The plea does not state that the goods were put into the possession of the tenant, to have any thing done with them in the way of his business as a factor. It is the common case of goods in stores: goods consigned to him, and placed in the store at storage.

The general rule is, that every thing in the premises is liable to distress. *Woodf.* 300. The exception is stated in *Willes*, 514. *Simpson v. Hartop*. The privilege belongs to the trader. *Gisborne v. Hurst*, 1 *Salk.* 250.

In *Francis v. Wyatt*, 3 *Burr.* 1481, *W. B.* 483, a coach sent to a livery stable, was held liable to distress: it being part of the profits of the premises. He also cited *Com. Dig. Distress, B.* 521, 523.

Chauncey, contra.—Goods in the hands of a wharfinger are protected—so of an auction store, so of a factor, in the store of which he is the tenant. He cited *Co. Lit.* 47. a. *Comyn's Land. and Tenant*, 317, 330. *Cro. El.* 596. 1 *Bay*, 102.

The opinion of the court was delivered by

GIBSON, C. J.—The right to distrain the property of a stranger, rests on no principle of reason or justice. It is a feudal prerogative, handed down from times when chattels were of little account, and when it may have been impolitic, if not unreasonable, to embarrass the lord with responsibility to one who had thrust his property in the way of the remedy to compel a performance of the services. But commerce which wrought a change in the habits and pursuits of men, and gave an importance to personal transactions, necessarily produced a relaxation of the rule, so as to admit of a variety of exceptions, some of them of early origin, in favour of trade. These have been so often enumerated, that it would be useless to pass them in review here, particularly as no two of the judges seem to have taken the same view of the principles applicable to them, or of the ground on which they

(Brown and others v. Sims and another.)

were sustained. But be this as it may, there is little reason to doubt that the exceptions will, in the end, eat out the rule. The most plausible argument in support of it is, that as the landlord is supposed to have given credit to a visible stock on the premises, he ought to be allowed recourse to every thing he finds there.* But this recourse cannot be presumed to have been in the view of the parties, where it would defeat the very object of the contract. The particular business for which the premises are let, is always known to the landlord; and where the course of it will necessarily put the tenant in possession of the property of those who deal with, or employ him, it is fair to presume, the landlord intended to dispense with his prerogative, because to do so would be manifestly for his advantage. This seems to have forced itself on the attention of *Lord Mansfield*, in *Francis v. Wyatt*; and, it is difficult to conceive how the court, in that case, arrived at the conclusion which it ultimately adopted. The reason assigned by Mr. Justice *Blackstone*, that the price of keeping the chariot was a part of the profits of the premises, is altogether unsatisfactory; for the price paid for shoeing a horse which is privileged from distress, is, in some respects, a part of the profits of the shop; and in the case of goods landed at a wharf, or deposited in a storehouse, (which, it is conceded, are privileged,) the price paid is purely a part of the profits. The truth is, that *Francis and Wyatt*, on which the defendant's case mainly depends, would now hardly be acknowledged as authority in *Westminster Hall*, the decisions, since the *American Revolution*, being inconsistent with it. Where the course of the business must necessarily put the tenant in possession of the property of his customers, it would be against the plainest dictates of honesty and conscience, to permit the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp, after having received the price of its exemption in the enhanced value of the rent. What is the case on these pleadings? It is admitted, that the tenant used the trade and business of a merchant; received goods and merchandizes from merchants and traders on storage, in the way of his trade; and that the plaintiff put the tobacco in his stores and warehouses, in the way of trade. It is immaterial that the occupation of the tenant was not exclusively that of a warehouseman. In *England*, trades and occupations are more definite in their nature, than here, where commerce is less regular in its operations; and in adapting a rule to its demands, we must necessarily have regard to the condition of things as we find them. To take goods on storage, though not the appropriate business of our merchants, is of such common occurrence, as to furnish an intendment that it enters into the consideration of the parties to every lease of a warehouse. The landlord knows that it is to be used for the general purposes of

* See *Gordon v. Falkner*, 4 T. R. 568.—REPORTER.

(Brown and others v. Sims and another.)

trade, and as this sort of bailment usually forms a part of the business of commerce, we are bound to say, the parties had regard to it as one of the usages of trade; and the landlord must, therefore, be considered as having waived his privilege in this particular instance.

Demurrer overruled.

[PHILADELPHIA, JANUARY 27, 1828.]

ESHER *against* FLAGLER.

IN ERROR.

Summons before a justice for damages not exceeding one hundred dollars, in holding and detaining a horse and selling him contrary to law. On appeal, the plaintiff declared in assumpsit for money had and received. *Held*, to be regular.

WRIT of error to the Court of Common Pleas of *Philadelphia* county.

This was an action of trespass brought by *Gilbert Flagler*, the plaintiff below and defendant in error, against *Conrad M. Esher*, the defendant below and plaintiff in error, by summons issued by *John Thompson*, Esq., a justice of the peace, under the act of assembly, entitled "an act regulating the proceedings of justices of the peace and aldermen in cases of trespass, trover, and rent," passed the 22d of *March*, 1814, for damages not exceeding one hundred dollars, in holding and detaining a horse and selling him contrary to law. After hearing, judgment was entered by the magistrate for the plaintiff for twenty-nine dollars; and the defendant appealed to the Court of Common Pleas. The plaintiff filed a declaration for money had and received. The defendant, *Esher*, obtained a rule on the plaintiff to show cause why he should not declare according to the circumstances of his case; which rule was subsequently dismissed by the court below. On the 13th of *February*, 1824, the plaintiff's death was suggested, and *Elizabeth Flagler* was substituted as administratrix. A rule of reference was entered by the plaintiff below, and arbitrators chosen, who awarded for the plaintiff twenty-five dollars. On the 20th of *October*, 1824, judgment was entered *nisi*, and, on the 10th of *November* the judgment was made absolute. On the 11th of *November*, 1824, a writ of error issued.

The following errors were now assigned:—

1. That the cause of action, before the justice, was founded on a tort; viz., *trespass vi et armis*, and that proceeded on in the Court of Common Pleas subsequently to the appeal, and contained in the declaration, was different, and founded on contract; to wit, *assumpsit* for money had and received.

(Esher v. Flagler.)

2. That the action was founded on the act of 1814, in relation to trespass, trover, and rent; and, the action in the Court of Common Pleas was proceeded in under the act of 1810, in relation to debts founded on contract.

PER CURIAM.—Where the declaration and the transcript agree in substance, we will disregard variances in form. Justices of the peace are not familiar with technical distinctions; and it would be monstrous to suffer an error in the style of the action to deprive a party of his appeal. It, however, happens here, that the justice was even technically accurate in his notion of the action, which he styles, “*trespass* for holding and detaining a horse and selling him contrary to law:” in other words, trespass on the case on promises, which is exactly the form of the action in the Court of Common Pleas, the plaintiff having counted for money had and received. From this one would be tempted to believe the justice had in his mind’s eye the familiar case of *Longchamps v. Kenny*, in which the price of a masquerade ticket, owned by the plaintiff, but sold by the defendant, was recovered in this form. But, wherever the justice had jurisdiction, in any shape, of the cause of action laid in the declaration, we will suffer no misconception of form to stand in the way of the appeal.

Judgment affirmed.

[PHILADELPHIA, JANUARY 27, 1828.]

OTTINGER *against* OTTINGER.

IN ERROR.

A deposition, taken before the register of wills, in support of an alleged will, in consequence of a *caveat* by one of the persons interested in preventing the probate, is evidence on the issue of *devisavit vel non*, ordered by the Register’s Court on an appeal afterwards entered by another person interested, not a party to the original proceeding.

ERROR to the Court of Common Pleas of *Philadelphia* county, where judgment was rendered upon a verdict in favour of the defendant below, upon an issue of *devisavit vel non*, directed by the Register’s Court, to try whether a paper writing, purporting to be the last will of *Isaiah Ottinger*, deceased, was his last will and testament. The verdict was found in favour of the will. *John Ottinger*, the plaintiff in error, was plaintiff below; and *William Ottinger*, defendant below and defendant in error.

The plaintiff objected to the admission in evidence of the deposition of *Cornelius Skillinger*, taken before the register on the 8th of *December*, 1804, but the court admitted it, and the plaintiff excepted.

(Ottinger v. Ottinger.)

This deposition was taken in consequence of a *caveat* against the probate of the will entered by *Hannah Ottinger*, widow of the deceased, on the 6th of *December*, 1804, in pursuance of an order by the register, made at the instance of *Abraham Kline* and wife, and others, the devisees and legatees named in the said paper writing, to be read in evidence in case of the sickness, absence, or other inability of the witness. The register admitted the will to probate; and the present plaintiff, the son of *Hannah Ottinger*, being then a minor, entered an appeal, on arriving at the age of twenty one, to the Register's Court, which directed the issue.

Chew, for the plaintiff in error, contended that the deposition is evidence only between the same parties; and that the plaintiff in error was not a party. 2 *Binn.* 511, 513. 2 *Yeates*, 231, 317. *Phillips*, 199. 1 *Cox*, 223. 3 *Burr.* 1244. 9 *Mod.* 90. 12 *Serg. & Rawle*, 284. 4 *Burn's Eccl. Law*, 173, 174, (251, another edition.) 3 *Wash.* 580.

Kittera, contra.—The deposition would have been evidence even the next year, from the very nature of the proceedings. It is part of the record. 1 *Yeates*, 87. 4 *Yeates*, 414. *Starkie*, 1421. 1 *Ch. Ca.* 73. *Gilb. Ev.* 60. 1 *Burr.* 146. 1 *Binn.* 263.

J. R. Ingersoll, in reply.—*Skillinger's* deposition was no part of the probate, nor is it annexed to it. 3 *Binn.* 506. 3 *Dall.* 327. *Peake's Ev.* 96. Depositions in bankruptcy are made evidence by act of parliament. 6 *Cranch*, 206. 1 *Alk.* 450. 1 *Mad.* 155. 1 *Vern.* 184. 1 *P. Wms.* 116. 1 *Vern.* 354, 441. 3 *Alk.* 387. 1 *Salk.* 278.

The opinion of the court was delivered by

GIBSON, C. J.—On a *caveat* against admitting a will to probate, the proceedings are not strictly between parties, because the decree is conclusive on all the world. But, even were this not so, yet the plaintiff has, by entering an appeal, acknowledged himself to have stood in the relation of a party from the beginning; for it is difficult to conceive of the allowance of an appeal on any other condition. The *caveat* entered by the mother, inured to the benefit of herself and every other party in interest, and the plaintiff would have been concluded by the decision of it, had not an appeal, on coming of age, been provided for him by the legislature. He was, therefore, either not a stranger to the proceedings, or else estopped from alleging it; and he, consequently, stands on no better ground than his mother would have done as a party to the same issue. This removes the only appearance of difficulty which is found in any part of the case. Even proof by a by-stander of what a deceased witness has testified in a cause between the same parties, is competent. But by the act of the 13th of *April*, 1791, the evidence of witnesses in the Register's Court is to be taken in writing and made part of the proceedings. And wherefore? Doubtless that it may be perpetuated. The legislature certainly did not

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intend to give an appeal with the benefit of excluding the testimony of every witness who should die in the meantime. We have, then, the common case of a deposition regularly taken in the cause, and admitted in evidence after the happening of the contingency for which it was designed to provide: in other words, the very case which the legislature had in view.

Judgment affirmed.

[PHILADELPHIA, JANUARY, 1828.]

In the Case of ALEXANDER HAMPTON, Guardian of SE-
RAZINE STEWART TREMILLS and JAMES M'CARTY
TREMILLS.

APPEAL.

An administrator having goods of the intestate in his hands, belonging equally to the heirs, cannot by charging himself with them in his accounts at the appraised value, make them his own, and then divide them unequally among the heirs.

Nor can a guardian who represents several minors, receive their money or property, and, being insolvent, give it all to one, and little or nothing to the others; but it will still be considered as theirs in equal shares.

Even real estate purchased by the guardian with the funds of the wards, will be treated as theirs, notwithstanding a conveyance by the guardian to one exclusively.

APPEAL from the decree of the Orphans' Court of the county of Philadelphia.

T. Sergeant, for the appellant.

Bradford, contra.

The opinion of the court, (ROGERS, J., dissenting,) was delivered by

HUSTON, J.—Captain *John Tremills* died, leaving three children by a former wife, and leaving a widow and four children by her.

The three children by the first wife are not interested in the case in question; having, so far as appears in this cause, received their share of the estate.

The widow administered, and being an improvident woman, it was discovered by her agent and attorney, that she had drawn and expended more than three thousand dollars beyond her share of the estate. This estimate included the goods of her deceased husband, which had been appraised and retained unsold in her possession. At this time no guardian had been appointed for her four children.

On the 6th of *April*, 1813, she was dismissed from being administratrix, and *Josiah Randall*, Esq., appointed administrator *de bonis non*. She was ordered to pay and deliver over to him the

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money and goods unadministered in her hands. She had previously settled an account of her administration, in which she had charged herself with the amount at which the personal estate was valued; and, after paying all the debts, the balance in her hands for distribution was thirteen thousand, nine hundred, and forty-nine dollars, and twenty-two cents: of this her own share, as widow, was one-third—four thousand, six hundred, and forty-nine dollars, and seventy-four cents; leaving for the seven children, nine thousand, two hundred, and ninety-nine dollars, and forty-eight cents. This makes, for each child, one thousand, three hundred, and twenty-seven dollars, and seven cents. The eldest children by the former wife I have said were paid by her, in fact, before this settlement. Immediately after this settlement, on application to the Orphans' Court, she was appointed guardian of her four children, and the administrator *de bonis non* gave her a receipt for three thousand and thirty-two dollars, and ninety-seven cents, as if paid to him by her, and immediately took a receipt from her for that same sum, as paid to her as guardian of her children, together with the further sum of two thousand dollars actually paid to her by him in cash. It is impossible not to see that this process was intended to discharge those persons who were bail for her as administratrix.

She had still in her possession the household furniture, plate, &c. left by her husband, to which she had probably made additions to considerable amount, though there is no certainty as to their precise amount. She had also in her possession the stock on a farm near the city, and some remains of a store there. She had purchased the share of two of her husband's eldest children, being two sevenths of a house in Sansom Street. Part of the price paid them was out of the money of her husband's estate. A suit was at this time pending against her by one of those children, and judgment obtained for above nineteen hundred dollars, which it was evident was paid off out of the two thousand dollars, in cash, paid her by the administrator *de bonis non*.

It is not pretended she had any other property in her possession, except the household furniture, plate, &c. at the farm, and the right to two seventh parts of this house. She had, however, just given a receipt for above five thousand dollars received for the use of her children, and as their guardian. She was at this time on the point of marrying; and willing, it would seem, to secure her children as far as possible, she conveyed to her son, *James M'Carty Tremills*, the two seventh parts of the house in Sansom Street, he paying her four hundred and ninety-one dollars. She, also, in consideration of love, natural affection, and for other good causes, conveyed and transferred to her daughter, *Serazine S. Tremills*, all the furniture, plate, jewels, &c. in the dwelling-house, specifying each article, valued at one thousand dollars. She also conveyed to the same *Serazine*, and two younger sons, *W.*

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R. Tremills and *F. Tremills*, all the stock, consisting of cattle, farming utensils, &c. at the farm, also valued at one thousand dollars.

At this time all her children were minors.

On the 26th of *April*, 1814, *Alexander Hampton* was appointed guardian of all the four children—he sold the household property conveyed to *Serazine* for eleven hundred and thirty-four dollars and eleven cents; the plate and jewellery for one thousand, four hundred and forty-four dollars, and eighty-nine cents; and the stock, &c. at the farm conveyed to *Serazine*, and the two younger children, for six hundred and fifty dollars. And, as there was nothing left to the mother, this is the whole those children received for their share of the personal estate: *Serazine*, if she got all produced by what was conveyed to her, having above eight times as much as each of the two younger, and about twice as much as the estimated value of the house conveyed to her elder brother, *James McCarty Tremills*.

It has been contended, first, that Mrs. *Tremills* had a right to take the personal property at the appraised price, according to the inventory—to consider it as a part of her widow's share of her husband's estate, and, having intended so to take it, it became hers absolutely, and she could dispose of it as she pleased; that at the time she conveyed it to *Serazine*, it had been several years in her possession, and she might have sold any article of it, or it might have been levied on and sold on an execution against her for her own debt.

I do not admit that an executor or administrator can generally take the personal goods of the testator or intestate at the appraisement, without being liable to either heirs or creditors for their full value. I admit that an executor or administrator may fairly sell any article of personal estate held by them as executors or administrators, and that an execution may be levied on it, if in their possession, and it may be sold, and cannot, in either case, be followed and recovered by the heir or creditor as goods of the testator. This, however, is only true when fairly sold by the executor, or fairly levied on and sold by a creditor of his, and is not true when fraudulently given by the executor to pay his own debt, to a person who knows it is not the executor's own goods, but the testator's, and as long as the goods remain in specie in the hands of the executor, they are not his until he has paid to the creditors or heirs the value of them.

This case does not require me to go more minutely into these distinctions,—it is very peculiar, and we have a positive law on the subject. By our act of the 4th of *April*, 1797, 3 *Smith's Laws*, 297, an administrator or executor, on settling his account and paying over the balance in his hands, and *surrendering the residue of his estate* to such person as shall be appointed to succeed him, may be discharged from the further administration of the estate—

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this at his own request,—or may, on complaint, &c. be dismissed by the court, who are authorized to compel a settlement of his or her account, to order him to deliver over and pay to the successor all and every the goods, chattels, rights and credits, title deeds, evidence, and securities, which were of the decedent, and which came to his or her hands, and remain unadministered, and to account for all the goods and chattels rights and credits, which have been previously administered, &c.; and, if such executor or administrator shall refuse or neglect to comply with the order of the court touching the premises, the court, on motion, shall proceed against him or them as is lawful in cases of contempt, or the succeeding administrator may proceed at law against him or them, or their sureties, or against any other person or persons who may be possessed thereof, for the recovering thereof; or both the said remedies may be pursued at the same time, if the case so require, until the end is fully attained.”

Under this law, then, the administrator *de bonis non* could—and, if it had not been for the arrangement made with her, must at his peril have proceeded to obtain possession of those goods, or the price of them. When she gave him the receipt, she took them as money due her children. I cannot pass over this transaction without expressing my astonishment that any Orphans' Court in *Pennsylvania* should ever have appointed an administratrix just dismissed, guardian of those minors whose money was in his or her hands, and this without security. She, however, considered the property as theirs, and so she told Mr. *Peters*, and declared her intention to convey it, to secure them; but they were equally entitled to it. Can an executor, who has goods of the testator in his hands, charge himself with it, and then divide it unequally among the legatees or heirs, who have been left equal shares; or can a guardian, who represents several minors, receive their money or personal property, and, being insolvent, give it all to one, and nothing to the others? If so, the right of devising, and the statute of distributions are worth little.

This is not the case of a sale, or disposition to a third and innocent person. It is true, she was indebted to each of them, but to *James* she conveyed more than she owed, and to *Serazine* she conveyed double what she owed. This overplus was a gift of what was not her own—a gift, by a person indebted to her two youngest children. It is true, *James* and *Serazine* were of too tender an age to be guilty of fraud in a criminal sense, in accepting these conveyances, and this property; but when, at more mature age, they by themselves or guardians claim to hold it, we cannot consider them as either innocent or fair purchasers. Both the guardian and ward must know, that to divest two younger children of their property, and give it to two elder, will require more than the clumsy process of a deed of gift by the guardian to the two latter.

I do not consider the testimony of Mr. *Peters*, as to her decla-

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rations that she designed an equal division of the property among her children, material in this case; but it was clearly admissible for several reasons. The counsel of *James* and *Serazine* had produced and relied on his statement in a letter to Mrs. *Tremills*. His testimony was proper to show how far she acceded to and agreed to that statement,—it was more material how *she* considered this property than how *he as her attorney* considered it. It was also material to give the court information of the exact state of the whole transaction—of the sums, times, and ways in which these funds had been disposed of, and to rebut the allegation that she had ever considered this personal property as her own. To prove a trust, also, is one of those cases in which parol evidence is admissible.

I have felt more difficulty as to the house conveyed to *James*, than the personal property conveyed to *Serazine*; but, as we have positive proof that nine hundred and ninety dollars, part of the price, was paid out of the general land of the heirs: and very strong presumptive proof that the two thousand dollars received from the administrator *de bonis non* went to discharge a judgment to one of the persons from whom she bought it. I think the house, also, is to be considered the joint property of the four children.

The opinion of the court is, that, under the circumstances proved in this case, Mrs. *Tremills* had no power to divide the property in her hands, as guardian of her four children, in the manner she did. It was not her own property, but the property of the children, and of the children equally, and must be so divided among them.

We confirm the decision of the Orphans' Court, as to the allowance to Mr. *Hampton*. As the sums awarded to each will now be different from those decreed, the order of the Orphans' Court as to the interest due *Serazine*, will be inapplicable to this case. But we adopt the principle on which the Orphans' Court proceeded; and the guardian must pay interest on the sum awarded to each.

[PHILADELPHIA, JANUARY 17, 1828.]

BROOKE and another *against* SHARPLESS.

IN ERROR.

Under the 28th section of the militia law of the 2d of *April*, 1822, if the proper officers of a company are not elected, or being elected, fail to perform their duty, without the fault of the brigade inspector or colonel of the regiment, the brigade inspector may appoint a person to make the enrolment and issue his warrant, to collect the sums payable by law.

THIS was an action of trespass, *vi et armis*; wherein *John Sharpless*, the plaintiff below, who was defendant in error, declared against the defendants below, for breaking and entering his close,

(Brooke and another v. Sharpless.)

and taking and carrying away; and converting to their own use, one set of chair harness, of the value of thirty dollars, one blind halter, of the value of three dollars, and one pair of lines, of the value of two dollars, altogether of the value of thirty-five dollars, of the goods and chattels of the said plaintiff, &c. To this declaration, the defendants pleaded not guilty.

On the trial of the cause, the plaintiff proved the taking and selling of the goods laid in the declaration by *Benjamin Smith*, one of the defendants, in obedience to the commands and directions of *Nathaniel Brooke*, the other defendant. The defendants gave in evidence to the jury, the commission of *Nathaniel Brooke*, one of the defendants, as a brigade inspector, of the first brigade of the third division, composed of the militia of the counties of *Chester* and *Delaware*, dated as of the 3d of *August*, 1821. They likewise gave in evidence the commission of *John Smith*, as colonel of the forty-ninth regiment of the militia, in the same brigade.

The defendants then called the said Colonel *John Smith*, who being duly sworn, deposed as follows:—

“The forty-ninth regiment is part in *Chester* and part in *Delaware* county; *East Goshen* township constitutes part of my regiment. At the election in the year 1821, *June* 4th, I was chosen colonel of the 49th regiment. I had been major for seven years before, of the first battalion of the same regiment. *Samuel Pennall*, was elected lieutenant colonel, *William Sill* was elected major of the first battalion, and *John Thompson*, major of the second battalion. We were all notified by the brigade inspector with a written notice. It was some length of time before the commissions came out, and Lieutenant Colonel *Pennall*, and Major *Sill* declined acting. The brigade inspector then advertised a new election for the major of the first battalion. I was appointed to superintend the election, and did so; and ran in one *Peter Paterson*. After the election, I notified him, and he refused to serve. Then another election was advertised for a major of the first battalion: Doctor *Hammer* was elected. He declined serving, as he was an officer in a rifle corps, and surgeon of our regiment. All this time I was inquiring for company officers to be appointed in the first battalion, and I could find no person to accept. Up to 1823, *Goshen* and *West Whiteland* were vacant. In the spring of 1823, in my orders, I ordered a new election for company officers for all that were vacant in the battalion. There were no company officers elected in pursuance of that order. There were no company officers for these two companies for twelve or fifteen years, until these two years past. There were no company officers in these two townships in the year 1821, 1822, and 1823. The order to hold company elections in 1823, was prior to the spring musters.

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The defendants also called *John Tompkins*, who deposed as follows:—

“I was employed, in the years 1822 and 1823, to enrol the militia residing in *East Goshen* township, by *Nathaniel Brooke*, brigade inspector. I was employed by a written authority;—[here the enrolment was shown to the witness;—being a paper headed, ‘A list of persons liable to perform militia duty in — company of the 49th regiment of *Pennsylvania* militia, commanded by Colonel *John Smith*, commonly called *East Goshen* company. Return taken by *John Tompkins*.’—It contained the names of eighty-eight persons, and their respective ages; among which was the plaintiff’s name, with an affidavit annexed, that it was a correct list of all persons liable to perform militia duty within the bounds of the said company, &c. Sworn to by *John Tompkins*, on the 30th of *August*, 1822.]—I took this enrolment, and returned it to *Nathaniel Brooke*, the brigade inspector. This is my name signed to the affidavit.” The witness being cross-examined said, “No part of this paper is in my handwriting, except the signature. The paper is in *Joseph Wetherby*’s handwriting. My enrolment was copied off. I gave him a dollar to do it.” The counsel for the defendants thereupon offered to give the said enrolment, with the affidavit of the said *John Tompkins* thereto annexed, in evidence. The plaintiff objected to the admission of the said enrolment in evidence, and the court decided that it was not legal testimony, and rejected it. To which opinion the defendants excepted.

The defendants again called the said *John Tompkins*, and showed him another enrolment nearly of a similar tenor, made in *September*, 1823; when the witness deposed as follows:—

“This is my signature, at the foot of the affirmation to this paper.” The witness being cross-examined said, “No part of this paper is in my handwriting. It was taken from an enrolment made by me, and copied by ‘Squire *Wetherby*. It is a correct copy.” The defendants then offered the said enrolment in evidence, with the affidavit of *Tompkins* thereto annexed. The plaintiff objected to it; and the court decided that it was not legal testimony, and overruled it. The defendants excepted.

The defendants then offered to give in evidence two warrants, under seal, dated the 5th of *July*, 1824, with the schedule of names thereto annexed, directed to *Benjamin Smith* as constable, and signed by *Nathaniel Brooke* as brigade inspector, ordering him to levy the sums set opposite the said names, among whom was the plaintiff’s, for two sums of two dollars each. The said warrants being the process under and by virtue of which the said property, mentioned in the declaration, was taken and sold by the said *Benjamin Smith*; and the said warrants being offered in connexion with the testimony, to prove that they were duly delivered to the said *Benjamin Smith* to be executed,—the plaintiff objected to the admission of the said warrants and schedules in evi-

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dence: and the court decided that the said warrants and schedules were not legal testimony, and overruled the same, and the defendants excepted.

The opinion of the court was delivered by

ROGERS, J.—The enrolment of the militia is the first step towards the complete organization of the military force of the state. Acting with a view to this primary object, the legislature have taken more than usual pains to provide persons whose duty it shall be to make the enrolment. In the seventeenth section they have prescribed the manner of the election of the captains of companies. If captains are not elected, they provide that the commanding officer may appoint, and also make the same provision when no election has been held. By the ninth section, it is made the duty of the captains to enrol every person, subject to militia duty, within the bounds of his company.

The legislature seem to have foreseen, that these salutary provisions might, in some sections of the state, be evaded; and have therefore enacted, in the twenty-eighth section, “That if it shall happen, that the public officers shall not be elected in any regiment or battalion of militia, or in any company or companies thereof; or who, being elected, shall fail to perform the duties required, in causing the militia to be enrolled, &c., it shall be the duty of the brigade inspector of the proper brigade, as soon after the first Monday in *June*, in every year, as conveniently may be, to employ one or more persons to enrol all and every person residing within the bounds of every such regiment or battalion, or of any such company or companies thereof, and liable to perform duty in the militia, who shall proceed in the same manner, and have the like authorities as are given to captains or commanding officers by the ninth section of the act.”

The contingency having happened after the first Monday in *June*, as above provided, the brigade inspector employed *John Tompkins* to enrol the persons liable to perform military duty, within the bounds of what was called the *East Goshen* company, attached to the 49th regiment of *Pennsylvania* militia, in the county of *Chester*.

All the brigade inspector requires for his protection, is the fact that the proper officers were not elected, or, if elected, that they had failed to perform the duties required. In such case it became his duty, (that the mischief which necessarily arose from a want of a proper enrolment might be avoided,) to appoint some person to enrol the men within the bounds of the company. This the brigade inspector has done, as directed by the act of assembly, and for this he, and the constable, who executed his warrant, have been held liable as trespassers. An omission to do this, as required by the legislature, who are the sole judges of its propriety, would, in my judgment, be a dereliction of duty, for which he would have

(Brooke and another v. Sharpless.)

been liable to, and have deserved punishment. Extraordinary pains appear to have been taken to procure the proper officers, which from some cause that may be easily conjectured, but does not distinctly appear, altogether failed. The failure, however, cannot with any semblance of reason, be attributed to the brigade inspector or Colonel *Smith*, and still less to the constable, who appears to have been anxious to afford the company an opportunity of being trained, and by this means avoiding the fine inflicted by the twenty-eighth section. It was for precisely such a case the section was intended, and for the court to give it a different construction would be to disregard the plain injunctions of the act. We cannot fail to perceive, that to *avoid* such attempted evasions, the twenty-eighth section was, for the first time, introduced into the militia law of the 2d of *April*, 1822. Aware of the difficulties which had heretofore been thrown in the way of the organization of the militia, the intelligent chairman of the military committee inserted this new principle. The fine imposed by the twenty-eighth section is intended to operate as a penalty on the individuals within the bounds of the company, whose duty it was to elect, or otherwise provide, the proper officers in the regiment. They shall not be permitted by combination, or even neglect, to avoid enrolment, and by this device escape from the performance of military duty. Even if the people had no opportunity of choosing their officers, as it is clear that they had, no blame is imputable to the brigade inspector, nor the constable, to whom his warrant was directed.

Believing, therefore, that the Court of Common Pleas erred in refusing the testimony, the judgment is reversed, and a *venire de novo* awarded.

HUSTON, J.—As the militia law, under which the proceedings which led to this action arose, is repealed, as I understand, and supplied by another, I should not have taken the trouble to put my opinion in this case in writing, were it not that it seems to me to involve an important principle.

The defendant here and plaintiff below, with eighty-seven others, are, as is alleged, liable to each a fine of two dollars *per annum*, for an indefinite period, without any fault of omission, or any unlawful act done by them or any of them. Such a case calls for reflection.

I shall refer to so much of the militia law as seems necessary to understand their situation.

By the 14th section, the brigade inspector is to appoint the time, and advertise for the election of a colonel and lieutenant colonel, in each regiment, and a major in each battalion.

By the 11th section, if any of these officers refuse to accept, die, resign, or remove, the brigade inspector shall forthwith proceed to the election of another.

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By the 19th section, the election of company officers shall be appointed, advertised, &c., by the major of the battalion, or lieutenant colonel of the regiment, and if one third of the enrolled militia men in any company do not vote, or if no election be held at the time appointed, or if those elected should refuse to serve, or to perform the duties of their office, the brigade inspector shall inform the colonel, who shall appoint officers, or order a new election.

By the 23d section, not less than five companies compose a battalion, and not less than six companies a regiment.

In 1821, an election was held in this regiment, and a colonel, lieutenant colonel, and two majors, were chosen. The colonel, and one major accepted, and were commissioned, and the lieutenant colonel and the major of this battalion refused to accept. Two other elections for a major were held, and a person elected each time, who refused to serve. No second election for a lieutenant colonel was ever ordered: there being no major, and no lieutenant colonel, no election was ever held or even ordered for officers of this company, of *East Goshen*; and, let it be remembered, the company could not itself order, or hold an election. It must also be remembered, that if there was any fault in electing the majors, at least four companies must have joined in the commission of that fault, and the other battalions had a part in the election of the lieutenant colonel. The brigade inspector was bound to proceed until he got an officer as major and lieutenant colonel, or at least, to inform the colonel, and he was bound to appoint company officers. The colonel says he was inquiring for company officers. The law says he shall appoint them, and if he can excuse himself, and fine the citizens by this vague, senseless phrase, inquiring for company officers, there is no meaning, and no justice in the law. How far did he live from that company, and of whom did he inquire? The legal mode was to appoint men to be officers, and if they refused; to appoint others, or to advertise an election, which the colonel may do, and which two years after he did do; and if no one attended the election, then, and not till then, are the company in fault.

The 28th section is relied on: it provides that if the proper officers shall not be elected in any regiment or battalion of militia, or in any company or companies thereof, or who being elected, shall fail to perform the duties required, in causing the militia to be enrolled and trained, and returns made according to law, it shall be the duty of the brigade inspector, &c., to cause them to be enrolled, &c., and to fine every man in the company two dollars. Take this section alone, and it is a most oppressive, and unreasonable provision; but take all the previous sections, and it is susceptible of a reasonable and just construction. It had been previously provided that if the brigade inspector, colonel, lieutenant colonel, or major neglected their duty, each or all of them might be arrested and fined. If all of them had done their duty, and the

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whole of a company or battalion refused to elect, there is some reason and justice in subjecting every man to an annual fine of two dollars. But I do not believe the legislature intended, or that the fair construction of the whole law will show, they intended to put it in the power of any brigade inspector to omit to call an election for a major or lieutenant colonel, and then omit to give the colonel notice to appoint company officers, and yet fine a whole company for not electing officers whom they could not elect, or not appointing officers, to appoint whom was the duty of the colonel. The men must first be put in default: it must, at least, be possible for them to do their duty, before they can be fined for not doing it. If the proper officers are not elected by *the fault of the men*, who refuse to attend an election, let them be fined; but if they are not elected, because the brigade inspector, who alone can do it, never appointed an election, he, and not the men, is punishable, and there is provision in the law to punish him. If the *men elect officers* who will not do their duty, there may be some colour of justice in fining them; but if they never had an opportunity of electing, to fine them is most unreasonable.

All the other companies, or a majority of them, must have joined in the election of those officers who refused to serve, yet the punishment is inflicted on the men of this company alone.

But this is not the only inconvenience and injustice arising from the construction contended for. The sixty-first section prescribes the mode of calling the militia into actual service, and this can only be done by the company officers proceeding to have them classed in the manner there prescribed; and no man not classed, can be legally called into service, or fined for not serving. The doctrine contended for by this brigade inspector, although it oppresses these men in peace, exempts them from service in war, and deprives the country of that protection which is the end and design of all militia systems.

I then hold, that where the brigade inspector, colonel, and other officers, have so far done their duty, as to make it possible for a company to elect officers, or to meet and train under those appointed by the colonel, and the company are in default, the 28th section applies—but deny that any fair or rational construction of this law subjects men to a fine, for not doing what the very law rendered it impossible for them to do: and the law does render it impossible for them to elect, until their officers appoint the time and place of election. I think the Court of Common Pleas was right.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY 25, 1828.]

The COMMONWEALTH *against* LESHER.

It is a good cause of challenge to a juror by the commonwealth, in a capital case, if, on being called to be sworn, he declares that he has conscientious scruples on the subject of capital punishment; and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict.

THE defendant, *William Lesh*, was indicted for murder, and tried at the Court of Oyer and Terminer and general gaol delivery for the county of *Philadelphia*, at *November* sessions, 1827, before GIBSON, Chief Justice, and Ton, Justice.

Isaac W. Morris, being called as a juror, declared,—

“That he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict.”

Whereupon *Pettit*, for the commonwealth, challenged him for cause. The judges not agreeing as to the challenge, ROGERS, Justice, then at *Nisi Prius*, being sent for by the court, took his seat upon the bench; and the court, after hearing *M^cLaughlin* and *D. P. Brown* against the challenge, and *Pettit* for it, allowed the challenge; the Chief Justice dissenting.

The defendant was convicted of manslaughter, and his counsel moved for a new trial; upon the ground that the court erred in permitting the challenge.

The point was argued on the 14th and 15th of *January*, 1828, before the judges of the Supreme Court, holding a Court of Oyer and Terminer.

In the course of the argument *Pettit*, for the commonwealth, cited the acts of 1805, 1806, and 1816, respecting jurors, and the precept of the judges, for summoning the jurors. *Constitution of Pennsylvania*, art. 9, sect. 3, 6, and 9. *Constitution of the United States*, art. 6, of amendments. *Co. Litt.* 117, 155, 157. 3 *Black. Com.* 363. *Johnson's Dictionary*, words “*partiality*,” and “*bias*.” 1 *Chitt. C. L.* 542, 372. *Bac. Ab.* title *Juries*, E. 5. *Act of the 29th of March*, 1813, *Purd. Dig.* 444. 1 *Burr's Trial*, 416 to 419. 3 *Dall.* 515. 4 *Black. Com.* 347. 2 *Hale*, 271. *Commonwealth v. Brown*, before Judge Ross, in *Bucks county*, 1826, (*MS. Reports*.)

Watmough and *D. P. Brown*, who argued for the defendant, cited 1 *Black. Com.* 29, 40. *Purd. Dig.* 443. 1 *Smith's Laws*, 25. 4 *Black. Com.* 352. 2 *Dall.* 213. *Commonwealth v. Allen*, decided in 1821 by TILGHMAN, C. J., and GIBSON, J.

(The Commonwealth v. Leshner.)

The opinion of the majority of the court, ROGERS, HUSTON, and TOD, Js., was delivered by

TOD, J.—The court are under obligation to the counsel, who gratuitously, I apprehend, as well as ably, have argued the question. It seems to be admitted that the rules of the common law must govern our decision. Equally undisputed it appears to be, that in every criminal trial, without exception, there is precisely the same right of challenging a juror for cause, given to the commonwealth or to the prosecutor, which is given to the defendant. The law guards against all the approaches of error and falsehood as much on one side as on the other: and, in challenges for cause, no distinction is admitted between bias and predetermination of a juror against a defendant, and bias and predetermination in favour of a defendant. The law, in every case, is scrupulous to prevent even the possibility of undue bias. It does not deal with a juror as with a witness; admit him, though it doubts him. The slightest ground of prejudice is sufficient. The prejudice itself need not be made out—the probability of it is enough. One related, though by marriage only, as remotely as the ninth degree, to the defendant or the prosecutor, may be challenged off the jury for that cause. Any one, who, in any possible way, no matter how honestly, has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is excluded. Nothing in the law can well be more extensive than this right of challenge *propter affectum*. In an attaint a juror was called. His father had been one of the petit jury—but was then dead—so that there was no possible interest, yet the son was challenged by the prosecutor, and excluded from the jury; “*for it is a presumption, (says the book,) that he will not say against the oath of his father.*” 21 Vin. Ab. E. d. 216.

And all these matters of real or supposed taint, upon the fairness of a juror, are not to be left to the discretion of *triors*. There is to be no inquiry whether the firmness of the man may not enable him to give a true verdict when upon his oath, notwithstanding his previous opinions. The law makes no such experiment; but the moment that any such fact of relationship, of favour, enmity, bias, or preconceived opinion is made out, it removes the juror without hearing one word further.

Such are the general rules of law, relative to challenges for cause. In this case *Isaac W. Morris*, being summoned and called as a juror on this trial, on an indictment for murder, and he declaring a predetermined opinion, and his inability from the dictates of conscience, to find this defendant, or any other defendant, guilty of murder in the first degree, no matter what the law might direct, or what the evidence and the facts might turn out to be; and he being, for that cause, challenged on the part of the commonwealth,

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the question to be decided is, was the challenge good? My opinion continues the same as upon the trial, that the cause of challenge is sufficient.

With those scruples of Mr. *Morris* I am not inclined to meddle. I may say thus far—it was manly and honourable in the juror to declare his sentiments: yet it does not seem to be material that the intimation of his unfitness to do justice in the case, came first from himself. If the court had overruled the challenge, and ordered Mr. *Morris* into the jury box, what degree of compulsion would have been necessary to oblige him to take the affirmation, which in his own heart he was determined to disregard, I do not know, nor will inquire. Clearly, if the prisoner has a legal right to a predetermined acquittal, founded on the conscientious scruples of those who may be called as jurors, it must be the business of the law to find out some means of assuring to him the benefit of his just claim.

Stripped of all colouring, the general right claimed in the argument, will, perhaps, be found to be the right of a defendant in the case of murder in the first degree, to evade, or rather to set aside the penalty of the law, by means of force employed by the court itself, coupled with falsehood, or something worse, by the jury; practised under the eye, and with the sanction of the court.

Forcing upon the jury one, two, or half-a-dozen like Mr. *Morris*, and obliging them to take a solemn affirmation which they must violate, is not the worst part of this doctrine; but, unanimity being necessary, the rest of the jury, who have no scruple, except to say the truth according to their oaths or affirmations, may be thus compelled to give a verdict against their better knowledge, or to some vile equivocation. It may well deserve reflection, by what rule of common justice, men who have no scruples against obedience to the law, but are ready to say the truth in their verdict, whatever may be the consequences, are to be put on a jury, and compelled to concur in one opinion with those who declare themselves to be, and actually are, bound by a tie of conscience, above all oaths, to deny the truth in every case where saying the truth may lead to that punishment which the laws have provided against murder in the first degree.

Opposed, as the claim here set up is to all the general rules of law, yet a distinction is attempted by the prisoner's counsel, by virtue of which they say Mr. *Morris* ought to have been permitted to take his seat as a juror, or compelled to do it, if compulsion was necessary—because his purpose to acquit, in spite of all proof, arose not from any special favour to the prisoner—but was the consequence of an undistinguishing, abstract opinion, or prejudice, the benefit of which was by no means personal to the defendant, but equally ready for the acquittal of every other defendant in the same situation. Now, it is not alleged that any precedent or authority can be shown for this distinction: nor that any case exists

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where a positive, fixed prejudication has been fully made out, that a challenge for that cause has been overruled, on account of the peculiar nature or cause of the prejudice, abstract or otherwise. The fact of predetermined condemnation, or of predetermined acquittal is all that ever has been, or ever well can be, inquired into. To go beyond that would be an impracticable refinement. Not only is this distinction without authority in the books, but it seems to me wholly unsupported by any reason; for, certainly, the mischief is the same whether the prejudice of jurors is general or special: there is the same perversion of truth, the same profanation of oaths, the same farce acted under the show of well and truly trying, the same prostitution of the solemn forms of criminal justice, and the same prostration of the law. If there is any thing in this distinction between abstract predetermination to acquit a criminal in spite of truth and law, and a particular prejudice applicable to one case only, that difference is, in my opinion, rather against the argument; because he whose judgment is warped by accidental error or misinformation, may, perhaps, give up his prejudices when he comes to know all the circumstances of the case, which it will be utterly hopeless to expect from him whose disregard of law and of truth is founded upon no misrepresentation of persons or of facts; but is rooted in the conscience, and made a part of his religion.

Try this distinction by any test whatsoever, and it is clearly inadmissible. I will make a supposition, not impossible nor very improbable. Suppose an opinion, the reverse of that of Mr. *Morris*, infused into members of the community, founded upon religion and conscience, and a strict literal construction of the divine law, that wilfully to kill a man is always unlawful, and a mortal crime, even in one's own self-defence—and a prisoner indicted and to be tried for murder, who acknowledges the fact of killing, but justifies the deed as done in the necessary protection of his own life—and, all peremptory challenges being exhausted, jurors are called, who, honest like Mr. *Morris*, declare beforehand that they are bound by a law, above all laws of the state, that if the fact of wilful killing is proved, it is murder, and they will sooner go to death themselves than let the prisoner escape—and that what they say, we know they will do. In answer to a challenge for this cause, how would it sound for the court to tell the man that there was no help for him in the law on account of a nice distinction between a determination to condemn in general, and a determination to condemn in particular? Your challenge would have been good had the prejudices of the jurors against you been less outrageous and universal: as it is—you must go—but with one most excellent consolation, that as the prejudices under which you suffer are not confined to your case, the next innocent man that comes to be tried, on the same facts and under the same scruples, must go the same way.

As to authority, I have said there has been none produced against the validity of this challenge. It appears to me a mistake to cite

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the high name of Chief Justice TILGHMAN as opposed to it. In *Allen's* case there was no challenge of any kind. The court could not challenge,—and the juror being agreed to by both sides, the judges, as it appears to me, had no alternative but to punish his disobedience.

It is said there is no instance of a challenge being allowed on account of the religious scruples of a juror. This may be so, with the exception of decisions by Presidents FRANKLIN and ROSS, in each of which, it is understood, a challenge of this kind was sustained. With these exceptions it does not appear that the case has ever arisen. In *England* it could hardly arise, and if it did, the right, or rather the practice of peremptory challenge on the part of the crown as well as the prisoner, would, probably, settle the question at once without debate. In *Pennsylvania* peremptory challenges, in cases of felony, were never expressly taken from the commonwealth, until by the act of assembly of 1814. Besides, the sheriff, until the year 1805, had the nomination of jurors; and it is not likely that he would summon, to serve on capital trials, those whose conscientious persuasions were known to be abhorrent from such service. We may easily discover wherefore this right of challenge, though always existing in the law, has been so rarely called into use.

It has been exceedingly pressed upon us by the counsel, why, when a man's life is at stake, decide a contested and doubtful point against the prisoner? Why not leave it to the legislature to dispel the uncertainty by a declaratory act? I would answer, there is no doubt in the case, nor ever has been since the first institution of jury trials. There would, perhaps, be as much of imbecility as of caution, in stopping short at every ingenious argument in a criminal case, and waiting for an act of assembly to remove difficulties which exist only in argument. I do not say that this identical opinion of Mr. *Morris* has been discussed and decided in any book: but the principle has been settled for a length of time beyond all records. The perpetual rule is shortly expressed in the words of COKE: "He that is of a jury, must be *liber homo*; that is, not only a free man and not bond, but also one that hath such freedom of mind as he stands indifferent, as he stands unsworn." *Co. Litt.* 155, a. Here there is no description given of the prejudice which shall disqualify a juror. All opinions present and to come are shut out which have the effect of partiality. It is said to be one of the excellencies of the common law, that it applies to all changes in the modes and habits of society—to new prejudices, new errors, new truths—that it never can be out-grown by any refinements, and never out of fashion while the identity of human nature exists. It is a law which deals in things rather than in names; and, by it, no contrivance nor means whatsoever ought to be effectual, to select a jury for the purpose of destroying the innocent or screening the guilty. True, in a capital case, the decision of the court, on points of law

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which are really doubtful, ought in favour of life to incline to the side of the prisoner. Yet, when we are told of the extreme severity of the punishment on conviction of murder in the first degree, it must not be forgotten that the infliction of death for certain kinds of atrocious murder, is the law of the community which we are bound to obey, and not suffer to be indirectly repealed. Nor, in my opinion, ought any thing short of positive authority to induce us to commence a practice fraught with so much danger of corruption, in criminal trials, as the putting of twelve men upon their oaths and solemn affirmations, some of them bound by their oaths and by the law to say the truth according to the evidence, and the rest of them bound as strongly by their conscience to deny the truth, with firmness and obstinacy, just in proportion to the atrocity of the facts in proof. So that the more aggravated the murder, so much more intense must be the struggle between conscience for the law and conscience against the law. One thing only is certain; let the verdict in any such case be as it may, it involves a consequence which need not be named.

In fine, my opinion is, 1st, That scruples of conscience in a juror, no matter how genuine they are, if there is no challenge on either side for that cause, cannot be taken notice of by the law. 2d. But that scruples of a juror, whether real or not, (for into their genuineness no human tribunal can easily inquire,) amounting to a predetermination to condemn, or acquit a prisoner, disregarding the evidence, or disregarding the law, if declared by the juror, or otherwise made known, form a legal ground of principal challenge; and if either side thinks fit to challenge for that reason, the cause is sufficient.

It follows, that, in my opinion, the challenge to *Isaac W. Morris* was rightly admitted; and that the motion for a new trial be denied.

GIBSON, C. J.—The question has been argued in part as if it stood on a challenge by the juror himself. It would, however, be even more difficult to sustain such a challenge than that which has been made by the attorney general. It is declared in the Constitution, (art. ix. sect. 3,) that “no human authority can, in any case, control or interfere with *the rights of conscience*.” But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal*. But *salus populi suprema lex*, is a maxim of universal application; and where liberty of conscience would impinge on the paramount right of the public, it ought to be restrained. Even Mr. *Jefferson*, than whom a more resolute champion of toleration perhaps never lived, claims no indulgence for any thing that is detrimental to society,

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though it spring from a religious belief or no belief at all. His position is, (*Notes on Virginia*—Query, xvii.) that civil government is instituted only for temporal objects, and that spiritual matters are legitimate subjects of civil cognisance no further than as they may stand in the way of those objects. He denies the right of society to interfere only where society is not a party in interest, the question, with its consequences, being between the man and his Creator; but as far as the interests of society are involved, its right to interfere on principles of self-preservation is not disputed. And this right is resolvable into the most absolute necessity; for, were the laws dispensed with, wherever they happen to be in collision with some supposed religious obligation, government would be perpetually falling short of the exigence. There are few things, however simple, that stand indifferent in the view of all the sects into which the Christian world is divided. In the case before us, it is said the rights of conscience might have been jeopardized by placing the juror in the predicament of either violating his affirmation or doing that for which his conscience informs him civil government has no warrant. Is not a witness who entertains the same scruples, exactly in the same predicament when compelled to testify to facts that may affect a prisoner's life? Yet it would not be endured that a murderer should escape punishment because the witnesses have qualms of conscience. To say there is no reason why the conscience of the witness, who merely says the truth, should be affected by consequences which are not of his seeking, is to say nothing. What more does the juror than say the truth, the consequences not being of his seeking? Guilt is a conclusion of law from facts rendered judicially certain; in the ascertainment of which, the witness who testifies, and the juror who pronounces on the credit of his veracity, are equally actors. But it is the law, and not the jury or the witnesses, that dooms the criminal to death. To go a step further. Would a sheriff who should entertain such scruples be excused from *executing* a criminal capitally convicted? No one pretends it. In the whole course of the prosecution, from its inception to its consummation, it is not easy to understand why the juror alone should be absolved from acting his part. There is a sect who deny the lawfulness of any government that is not founded exclusively on the express word of God; and who, consequently, will not swear to support the state or federal constitution, or, in any way, mingle in civil affairs. Would a judge be justifiable in exempting one of these from the laws which require the citizen to testify as a witness, serve as a juror or constable, and perform many other onerous services? If he would, the militia laws which contain no exception in favour of the society of Friends, are a monstrous abuse of the powers delegated in the constitution.

The true question then is, whether error of judgment in respect of an abstract proposition, which is independent of the circum-

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stances of the prisoner's case, but which may affect it consequentially, be a ground of challenge for cause by the commonwealth.

It is conceded that no alteration in this particular has hitherto been made in the law; and it is therefore an extremely suspicious circumstance that the books contain no instance of such a challenge. The inference from this is not rebutted by referring to the stat. 7 and 8 *W. 3, c. 21*, as having obviated all question on the subject in *England*, by disabling Quakers from serving on juries. It is notorious that members of other religious denominations deny the lawfulness of capital punishment. So prevalent was this opinion at one time, that the executive of *Pennsylvania* recommended the abolition of capital punishment altogether; and it is known that the measure had many friends in the legislature. But the truth is, this opinion is not held by the Society of Friends as a body; as I have heard a gentleman of that denomination, who honourably discharges a high judicial trust, repeatedly declare. If the crown had all along a right to challenge for this cause, instances of the exercise of it must have occurred. Chief Justice WRAY used to compare a case without a precedent to a bastard that had no cousin, (3 *Rep. 23, a.*;) and Lord COKE says: "True it is that every precedent hath a commencement; but when authority and precedent are wanting, there is need of *great consideration* before that any thing of novelty is established, and to provide that this be not *against the law of the land*." (12 *Rep. 74, b.*) I consider the want of a precedent for such a challenge, as strong evidence of the law.

If, then, the books do not furnish the very case, do they furnish a principle in which it is embraced? Challenges to the polls for cause, are divided into such as are *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*; there is no possible cause of challenge that may not be arranged under one of these heads. The first does not exist here, as the law acknowledges no distinction of rank; nor can the case be referred to the last, as the objection does not impute criminality to the juror. Neither is it referrible to the second; for, according to Lord COKE, who is perhaps the best authority on the subject, there are but four causes of challenge *propter defectum*; to wit, alienage, villienage, insufficiency of freehold, and want of hundredors; under none of which can the cause of challenge here be ranked. But it seems Lord COKE has also said,—“He that is of a jury must be *liber homo*; that is, not only a freeman and not bond, but also one that hath such freedom of *mind* that he stands *indifferent*, as he stands unsworn.” (1 *Inst. 155, a.*;) that is, as I understand it, indifferent as to *the parties*; and the want of such indifference is the ground work of every challenge *propter affectum*, whether principal or to the favour. What does Lord COKE himself say?—“A principal challenge is where there is *express* favour or *express* malice.” (1 *Inst. 157, a.*) And again:—“Challenge to the favour, when

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either party cannot take any principal challenge, but sheweth causes of favour which must be left to the conscience and discretion of the triors to find him favourable or not." (1 *Inst.* 157, b.) Is this the language of a man who is describing error of opinion in respect of an abstract proposition? Insanity might as well be alleged as a cause of challenge for favour. It is impossible not to see that Lord COKE intended to use the words malice and favour in their natural sense, and not to signify a constructive partiality which should be consistent with absolute indifference to the parties personally; and thus explained, the freedom of mind of which he speaks, is plainly nothing else than exemption from the dominion of the passions. All the examples he has put, are instances of favour or malice as regards the person.

As far as *authority* is concerned, therefore, it is against the allowance of the challenge. But the naked fact that no case of the sort has arisen in *England* or our sister states, or had arisen in *Pennsylvania previous to the entire abolition of peremptory challenges by the commonwealth*, shows conclusively the nature of the mischief, and the remedy for it at the common law. The fallacy of the ingenious argument of the attorney general, is in supposing that there could be no other remedy than a challenge for cause; and the effect was rendered the more imposing by putting the converse of the case after the prisoner's peremptory challenges are spent. Twenty peremptory challenges, if judiciously managed, are sufficient to obviate every disadvantage of the kind; and if the prisoner wastes them on frivolous objections, it is a misfortune against which the forecast of the law cannot secure him. But even should that occur, his situation would be no worse than if an enemy, known to be such only to himself, were to be called to the box after all his peremptory challenges had been spent. Such a case is within the range of possibility, but it is an insecure foundation for an argument. But why should a prejudice on this head be alleged as a cause of challenge, more than an abstract prejudice arising from divisions in religion or politics? The Catholics have been accused of holding it meritorious to destroy a heretic; and perhaps, if the account were fairly stated, the Protestants would not be much in their debt. It is certain that party prejudices, whether sectarian or political, are as fierce, and operate as powerfully to pervert the understanding and bias the judgment, as prejudice in respect of abstract subjects. Yet no one thinks of a sectarian or a political opinion as a cause of challenge; but where the party thinks it will operate to his disadvantage, he sets the juror aside without assigning a cause.

If, then, mere error of opinion were not a cause of challenge before the abolition of peremptory challenges by the commonwealth, can we declare it to be so now? The abrogation of a privilege which had put the commonwealth barely on a footing with the prisoner, very satisfactorily indicates an intention to leave him in possession

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of all adventitious advantages. The inference of such an intention, is corroborated by the acquiescence of the legislature in the construction put on the act of assembly in *The Commonwealth v. Allen*. I do not insist on the abstract authority of that case; not because the decision is not full to the point, (for I perfectly remember that the whole ground was examined,) but because it was ruled in the hurry of a trial. But, although this occurred during a session of the legislature, and became a subject of discussion in the newspapers, it produced no new enactment. After this, it seems to me, we cannot deprive a prisoner of the incidental advantages of the act of assembly by enlarging the bounds of the challenge for cause. We can have nothing to do with the unreasonableness of this particular advantage. Our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal: a new trial cannot be awarded after an acquittal produced by the most glaring misdirection; and the prisoner is to be acquitted wherever there is a reasonable doubt of his guilt. These, and many other unreasonable advantages, the law allows on principles of humanity or policy; and, if the legislature chooses to throw in the full and exclusive benefit of peremptory challenges, who can object? No one is more thoroughly convinced of the mischievous consequences of the act of assembly in practice, and the abstract propriety of the objection to the juror here; or is more desirous of seeing the common law remedy restored by the proper authority. But feeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner on trial for his life. That Chief Justice argued very ill, who, in a capital case, admitted a jury not freeholders, saying,—“Why may not we make precedents to succeeding times, as well as those who have gone before us, have made precedents to us.” Such an occurrence in the trial of *Algernon Sydney*, is spoken of in terms of indignation, (*Burnet's own Times*, Lond. Ed. 1724, vol. i. p. 570.) Were the judges to set the law to rights as often as it should differ from their ideal standard of excellence, it is a hundred to one that their corrections would not hit the taste of those who came after them; and we should have nothing but corrections, while there would be no guide in the decision of causes but the discretion of fallible judges in the court of the last resort, and no rule by which the citizen might beforehand square his actions. “The discretion of a judge,” said one of the greatest constitutional lawyers that ever graced the *English* bench,* “is the law of tyrants: it is always unknown: it is different in different men: it is casual and depends upon constitution, temper, and passion. In the best it is oftentimes caprice—in the worst, it is every vice, folly, and

* Lord CAMDEN.

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passion to which human nature can be liable." I concede it to be one of the excellencies of the common law, that it admits of perpetual improvement by accommodating itself to the circumstances of the age. But every beneficial change has been by gradations so slow as to be absolutely insensible; and to prevent even those by whom it was wrought from being conscious of it. Lord MANSFIELD succeeded admirably where nothing was first to be pulled down; but wherever the common law was thrust aside to make room for his improvements, its superiority has been vindicated by experience, and little now remains of all he built up, except his commercial law and the expansion which he gave to the action for money had and received. Every system of jurisprudence will necessarily be defective; and if we interfere to remedy every insignificant defect, experience will assuredly convince the profession if not ourselves, that our reason is no better than the reason of those who went before us.

Motion refused.

[PHILADELPHIA, JANUARY, 1828.]

MIFFLIN *against* SMITH and another.

During the continuance of a partnership, the ostensible partner carried on the business of the partners in the same name as that in which he transacted his private business, and in that name contracted a debt for money borrowed; but it did not appear whether the money was borrowed for the partnership, or his private use: *held*, that in the absence of evidence the presumption of law is, that the loan was made on the credit of the partnership business.

Of general and limited partnerships.

Though a co-partnership is by the articles to terminate at a certain period, it may be continued by express or tacit consent; and, in such case, the stipulations of the original articles would be considered as those of the continuing partnership.

Where two partners, one ostensible the other dormant, agreed, by private articles of co-partnership, to transact business in the name of the ostensible partner, *Nathan Smith*, but the business was carried on in the name of *N. Smith*: *held*, in an action against the partners, on a contract made in the name of *N. Smith*, that, to avail themselves of this objection, the defendants must plead it in abatement.

THIS cause was tried at *Nisi Prius* held before ROGERS, J., at Philadelphia, where a verdict passed in favour of the plaintiff for three thousand, one hundred, and eighty-one dollars, and twenty-two cents, and the defendants now moved for a new trial.

The suit was brought by *Lloyd Mifflin* against *Newberry Smith* and *Nathan Smith*, trading under the name and firm of *N. Smith*, to recover the amount of several sums of money, loaned, as was alleged by the plaintiff, to the defendants, as partners.

The history of the transaction, as reported by Judge ROGERS, appeared from the evidence to be this. On the 13th of August,

(Mifflin v. Smith and another.)

1818, *N. Smith* drew a check, on the *Camden Bank*, for one hundred and fifty dollars, payable the 20th of *August*, 1818. On the same day there was a similar check for the same amount, payable the 26th of *August*, 1818. *August* 3d, 1818,—a note for six hundred dollars, payable sixty days after date; *Nathan A. Smith* drawer, and *N. Smith* endorser, payable to *N. Smith*, dated the 3d of *August*, 1818. A note for eleven hundred and fifty dollars, payable also sixty days after date; *N. Smith* the drawer, and endorsed by *N. A. Smith*, dated the 4th of *August*, 1818.

This *Nathan A. Smith*, it appeared, was the father of one of the parties, and the person whom they resorted to when they wished to raise money for the concern.

N. Smith, being desirous of borrowing money for the concern, as was alleged by the plaintiffs, deposited these notes and checks as a collateral security, and sometime, but when did not clearly appear, borrowed the sum of fifteen hundred dollars from the plaintiff. He, at the same time, drew a check on the *Mechanics' Bank* for fifteen hundred dollars, payable to himself or bearer, dated *September* 3d, 1818.

After this, being desirous of borrowing more money on the same account, as was alleged, he drew a check on the *Mechanics' Bank* for two thousand dollars, payable to bearer, dated the 14th of *September*, 1818. On this check Mr. *Mifflin* loaned him fifteen hundred dollars; and on this check two successive payments were endorsed, which reduced the amount due to two hundred and eighty-eight dollars, and thirty-five cents.

From this statement, it appeared how the claim of the plaintiffs was made up. It consisted, first, of—

Three checks, amounting to	-	-	-	-	\$300,00
Second, the first check for	-	-	-	-	\$1500,00
The balance due upon the second check for \$1500,					\$288,35
					<hr/>
					\$2088,35

The defendant did not dispute but that the plaintiff was indebted to that amount, but they contended that they were not liable to pay it as partners; and the following facts were then shown:—

On the 1st of *January*, 1813, there were articles of co-partnership entered into between *Nathan Smith* and *Newberry Smith*, for five years and eight months, to carry on the business of lumber merchants. It was to be carried on in the name of *Nathan Smith*.

This partnership expired, by its own limitation, on the 1st of *September*, 1818.

That this was a partnership, appeared as well from the articles as from the books, which were produced. It also appeared, from every transaction of which evidence was given, that *Nathan Smith's* business, whether for himself or for the concern individually, had been done under the name of *N. Smith*.

(Mifflin v. Smith and another.)

It was also admitted that *Newberry Smith* was a dormant partner in the lumber business.

His Honour held, that, for enabling the plaintiff to recover, he must show, 1st, That there was a partnership at the time the transaction took place. 2d. That this was a partnership transaction.

This was positively asserted on the one side, and as positively denied on the other.

The first point to which he drew the attention of the jury, in his charge, was, what was the nature of this partnership, and how long it continued. Before doing this, he noticed an objection which had been made,—that the firm was *Nathan Smith*, and not *N. Smith*; and that they have declared against a firm called and known by the name of *N. Smith*. That this was a point of law for the court, on which the defendants were entitled to an opinion. This was the case of a dormant partner. The articles call the name of the firm *Nathan Smith*; but, in practice, they baptize it by the name of *N. Smith*. *Nathan Smith* and *N. Smith* were acknowledged to be one and the same person. It was obviously a mere matter of form. In such a case he could not turn a plaintiff out of court, unless it was a very plain case. It would be an injury to a defendant himself, when he had more defences than one, particularly if he had one on the merits of the cause.

But what is there in the objection? The defendants keep their articles in their pocket, carry on their business by the name of *N. Smith*, lie by from *December, 1823*, until 1827, plead the general issue, and want us to turn the plaintiff out of court.

If they wished to avail themselves of this, they should have done it by a plea in abatement, and should have taken the earliest opportunity of doing so. They would then have given the plaintiff a better writ, and would have told the world who they were. The distinction between parties plaintiff and defendant has been often and well taken. I shall not enlarge on this point, but shall conclude by saying that there is nothing in this objection.

He then called the attention of the jury to what was the nature of the partnership, if any existed; and the time it continued.

There was no doubt it was a dormant partnership; and it was contended, also, that it was a limited one. In one sense, at least, it was, for it was limited in time. It is difficult to define what is a general and what is a limited partnership, for all partnerships are more or less limited. Some partnerships are more general than others; that is to say, they comprehend a greater variety of particulars. A partnership may be limited to a particular branch of business, without extending to all the concerns in which any member of the firm may be engaged. So, also, if two who are not partners in trade draw a bill of exchange, they are partners as to the transaction of the bill. So, also, there may be a general partnership among several, and one may be a partner as respects a particular article. It did not, however, appear that this partnership

(Mifflin v. Smith and another.)

was a limited one. It was a partnership to carry on the lumber business, which every body knows to consist of a variety of particulars,—shingles, planks, boards, &c. It was as much a general partnership as the case of a retail merchant, acknowledged to be so: more general, to be sure, but still a general partnership for that particular business. Nor did he consider that question as very material in this cause.

When did this partnership end? The defendants say it ended the 1st of *September*, 1818. The plaintiff denies that it ended until the 25th of *November*, 1818. There can be no doubt, that if this question depended solely upon the article, that the partnership ended the 1st of *September*, 1818. But it was equally clear, that it may have been continued after the 1st of *September*, 1818, by tacit or express consent; and, in such case, they would be considered as continuing business under the same stipulations and restrictions as were contained in the original written articles. The experience of the jury would satisfy them of the propriety of this, and doubtless they had known instances of the kind. Did they, then, close their concerns on the 1st of *September*, 1818, in conformity with the articles, or did they continue business after that period. In determining this question, the jury would give due weight to an account of stock having been taken, according to the articles, and balancing their books, and to the articles themselves. On the other hand, they would consider the papers of the 25th of *November*, which have been relied on, there being no ostensible change in the manner of doing business, and all other circumstances connected with the case.

He was bound, however, to say, that the writings of the 25th of *November* would not of themselves show a continuance of the partnership after the 10th of *September*.

Connected with this part of the case, it was necessary for the jury to inquire when this contract was made; for, if made before the 1st of *September*, there is no doubt it was made during the existence of the partnership.

They would likewise remember that this suit was brought to recover the amount of two checks; one dated the 13th of *August*, and payable the 20th of *August*, the other dated the 14th of *August*, and payable the 26th of *August*. When did this transaction take place? before or after the 1st of *September*?

There were also two notes; one dated the 3d of *August*, 1818, the other the 4th of *August*, 1818.

This was before the 1st of *September*.

The checks were dated the one on the 3d of *September*, and the other on the 14th of *September*.

It did not distinctly appear from the evidence when the transaction took place. It appeared strange that the time was not reduced to a certainty either by the plaintiff or defendants. The jury were acquainted with the manner in which business of this kind is done;

(*Mifflin v. Smith* and another.)

for it seemed to have been done by themselves, without witnesses; and carelessly enough.

This was referred to the jury as a matter of fact. If before the 1st of *September*, it was during the continuance of the partnership. If after, and before the 25th of *November*, it was, or was not, as they determined the question, whether the partnership continued until that time.

In the next place, was this a partnership transaction?

It would be necessary for the jury to consider this question, only in the event that they should believe the contract was made during the partnership. If they believed this, it became a very important question in the determination of this cause.

Newberry Smith was a dormant partner. The business of the concern was carried on in the name of *N. Smith*, and with the knowledge of *Newberry Smith*. That being the case, during the continuance of the partnership, (if such should be the opinion of the jury,) he applies to the plaintiff for aid, and obtains a loan of a sum of money. Then the question is, is that loan, in presumption of law, made on the faith of the regular business, viz. the lumber business or the credit of any speculations, in which he, (*Nathan Smith*,) may be engaged in his own account.

It is the opinion of the court, that it is to be considered as made on the faith and credit of the regular lumber business in which he was engaged, and not on account of any speculation in which he may have been concerned on his own account. If a retail merchant gets a note discounted, is it not presumed to be in the regular prosecution of his business? If a neighbour who is in trade borrows money of another, what is the presumption? Can it be presumed that he intends to buy a house?

The difficulty arises from the name of the individual and the name of the firm being the same. That is the presumption, liable however to be rebutted, if the jury believe from the evidence that was not the state of the fact. It is open to them to show it was for the individual concern of *Nathan Smith*. This they say they have done: that it was intended for the purchase of houses. Was this a partnership matter, or a mere mode of selling his lumber?

The question is not whether the credit was given to *Newberry Smith*, but whether it was given to the partnership concern in the lumber business. If it were, although *Newberry Smith* was a dormant partner, yet he is liable. In a partnership all the partners are liable, whether dormant or known.

If the jury should be of opinion that this was an individual concern, and not a partnership, although the money went to the partnership, they would not be liable. Thus, where two persons are partners, and known as such, and one borrows in his own name, there is no room for presumption. If he carries it to the partnership, he becomes the creditor of the partnership.

(Mifflin v. Smith and another.)

The defendants filed the following reasons for a new trial:—

The verdict was against the evidence in this, 1. On the whole of the evidence it appeared that the loans of money for which the action was brought, were made to *Nathan Smith*, one of the defendants, on his own credit, and for his own separate use, and were not made to the two defendants, nor upon the credit of both.

2. It also clearly appeared, that no part of the said monies loaned came in any shape or way whatever to the use or benefit of the defendant, *Newberry Smith*, either in his joint or separate capacity.

3. The fact of such monies being loaned, was unknown to the defendant, *Newberry Smith*, until the institution of the suit brought by the plaintiff in the District Court to ——— term, or shortly before the same.

4. The partnership between the two defendants expired on the 1st of *September*, 1818, which was before the loans, on which alone the plaintiff sought to recover, were made.

The court erred in charging the jury,—

1. That the objection made to the *name* was not valid, but should have been pleaded in abatement.

2. In confining the limited character of the partnership to a limit in point of time. The argument of the defendants being that it was limited as to the nature of the business, and that the defendant, *Newberry Smith*, could not be bound, except for *responsibilities* incurred in that business.

3. In saying that it was a *general* partnership in the lumber business.

4. In instructing the jury that the real question was, *when* the money was borrowed, not when the notes and checks were given.

5. In instructing the jury that the presumption of law was, that the loan was made upon the faith of the regular lumber business, and not upon the faith of any other business; and, if the former, that *Newberry Smith* was liable. And that the burden of proving that the papers were executed and the money lent upon the faith of *Nathan Smith* alone, and for other purposes than partnership purposes, was upon the defendants.

6. In instructing them, that the question was not whether the credit was given to *Newberry Smith*, but whether it was given upon the credit acquired by *Nathan Smith*, in virtue of his concern in the lumber business, no matter whether the parties were known or not.

The motion for a new trial was argued by *Scott* and *Rawle*, in support of it, and by *Hopkins* and *J. R. Ingersoll*, *contra*.

By the Court.—Motion refused.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT, MARCH TERM, 1827.

[PHILADELPHIA, MARCH, 1828.]

GHEEN, Executor of OSBORN, *against* OSBORN.

IN ERROR.

Testator died the 16th of *May*, 1814, having by his will devised to his wife a house and garden, during her natural life, and then to her son.

He also gave her some other specific bequests, and then bequeathed her, one hundred dollars yearly, and every year during her natural life, and fifty dollars to be paid in one month after his decease, all which devises and bequests were in lieu of dower. The wife died the 22d of *March*, 1824. *Held*, that the rent was to be apportioned up to the time of her death.

Péter Osborn, by his will dated 4th of *June*, 1813, bequeathed to his wife the house in which he lived, with the garden, &c.; to be enjoyed by her during her natural life, and then to his son *Joseph*, the defendant, in fee; certain furniture, as much fruit growing on the place as should be sufficient for her use, and firewood was also given, together with a horse, &c., to be kept for her.

"The will then says, I do further bequeath to my said wife, the sum of one hundred dollars, to be paid to her out of my estate, yearly and every year during her natural life, and also the further sum of fifty dollars to be paid to her in one month after my decease, all which devises and bequests are given to my said wife in lieu of her dower."

The defendant was the executor of *Peter Osborn*, also devisee, and had assets to pay all the debts and legacies. *Peter Osborn*, the testator, died *May* 16th, 1814. *Elizabeth Osborn* died 22d of *March*, 1824.

The single question was, whether the plaintiff could recover for

(Gheen, Executor of Osborn, v. Osborn.)

the apportioned part of the annuity to *Elizabeth Osborn*, of one hundred dollars, as due at the time of her death.

The court below charged the jury that the said annuity could be so apportioned.

The defendant excepted, and assigned for error that the said annuity could not be so apportioned.

Tilghman, for the plaintiff in error.—There is no doubt of the law in *England*. It required a statute there which relates only to rent. 7 *Wils. Bac.* 25. This statute is extended to *Pennsylvania*. He cited *Black. Rep.* 1016. *Clancy*, 387. Annuity will be apportioned only in case of *separate* maintenance. In 8 *Serg. & Rawle*, 299, there is nothing but a *dictum*.

The opinion of the court was delivered by

HUSTON, J.—*Peter Osborn*, by his will dated 4th of *June*, 1813, devised a plantation to his son *Joseph*, and to his wife *Elizabeth*, the house in which he lived, with the garden, &c., to be enjoyed by her during her natural life, and then to his son *Joseph* in fee; he also gave to his wife certain furniture, as much fruit, growing on the place as should be sufficient for her use, also her firewood, and a horse to be kept for her, and then adds, “I do further give and bequeath to my said wife, the sum of one hundred dollars, to be paid to her out of my estate, yearly and every year during her life, and also the further sum of fifty dollars to be paid to her in one month after my decease, all which devises and bequests are given to my said wife in lieu of her dower,” and charged this annual sum on the plantation devised to his son, who was also his executor.

The descendant is executor and devisee of *Peter Osborn*, and has assets to pay all the debts and legacies.

Peter Osborn, the testator, died the 16th of *May*, 1814.

Elizabeth, the widow, died the 22d of *March*, 1824; so that there was a fraction of ten months and eight days elapsed, after the last payment, on the 16th of *May*, 1823.

The single question was, whether the plaintiff below could recover the portion or part of the sum of one hundred dollars, as due at the death of the widow. The Court of Common Pleas decided, that he was entitled to recover it.

In *England*, the land in case of intestacy, goes to the heir at law, or to the devisee in case of a will. The personal estate in the case of intestacy is distributed; and in case of a will, goes as bequeathed; and surplus not disposed of, goes to executors generally.

In this state, all the children are equally heirs of real estate, in case of intestacy, and an executor is trustee for all the children of any surplus, after paying debts and legacies. It is obvious, then, that it may often be material in that country, whether rent or annuity charged on lands, goes to heir or to executor, when

(Gheen, Executor of Osborn, v. Osborn.)

under the same circumstances, it would be perfectly immaterial here. Hence, we have fewer cases on the subject of apportionment brought before our courts.

Until the statute of 11 *Geo. 2*, rents were not apportioned; and it has been held in *England*, that the statute does not extend to annuities.

But it has been settled in that country, that an annuity for the support of daughters is apportioned and is to be paid up to the death of the daughter, or to the period when the annuity is to cease.

So also an annuity to a wife for her separate maintenance, has been apportioned, and decreed, that the fraction occurring between the last day of payment and her death, is to be paid.

Dower lasts during the life of widow, and it would be strange, that what is accepted instead of it should not last as long. It would be strange that what is given to maintain a child, though payable at specified periods, or to support a wife separated from her husband, should each run on to the time of the death, and a like provision for a widow should determine before her death. Debility, sickness, increased expense, and additional wants often precede death; and on the ground of intention, no testator ever designed, that the last hours of his widow and her funeral should depend on charity.

The widow may always reject the devise, and claim her dower: her title to the bequest depends on her giving up her dower, which would last till her death: she then may be considered a purchaser of the annuity, till the same period, when her dower would cease.

In case of intestacy and valuation, or partition of the lands, her share is left in the lands, and charged on them by law, and the interest to be paid annually; and is recoverable, if not paid, is expressly in lieu of dower, and is always payable up to the day of the death of the widow.

I consider this matter as settled in this court in *Sweigart v. Feay*, 8 *Serg. & Rawle*, 299. It is always intended as a provision for life: it is such in its nature, though generally made payable at a stated period; yet this is done to prevent the trouble and irritation which would arise from a weekly or daily demand.

Judgment affirmed.

[PHILADELPHIA, MARCH 27, 1828.]

BARNET *against* IHRIE.

IN ERROR.

Assize of nuisance is an existing remedy in *Pennsylvania*, not altered in essential points, though in matters of form it ought to be adapted to modern practice.

In such action, the recognitors are not to be summoned and sworn according to the act directing the mode of returning and selecting jurors.

Nor are the proceedings irregular because there has been a defect in the pleading, since the whole case may be put before the recognitors at large, without regard to pleading.

It is not error that no judgment was entered below *quod capiatur assisa*.

Exceptions purely technical not regarded in this action.

WRIT of error to the Court of Common Pleas of *Northampton* county, in which judgment was entered for the defendant in error and plaintiff below, *Peter Ihrie*, in an assize of nuisance, brought by him to *August* term, 1825, against *William Barnet*, the plaintiff in error and defendant below.

The *præcipe* directed the prothonotary to issue a writ,

For that whereas the said *Peter Ihrie* the elder, complains that *William Barnet* the elder, unjustly and without judgment has erected, levied, and raised a certain wall and dam, thereby obstructing a certain mill site and a certain watercourse, called the *Bushkill* creek, and has obstructed a certain other watercourse in the borough of *Easton*, in the said county, to the nuisance of the freehold of him the said *Peter Ihrie* the elder, situate in the same borough and county within thirty years last past: Wherefore we command our sheriff that if the said *Peter Ihrie* the elder make him secure of prosecuting his claim, that he shall cause twelve free and lawful men of the neighbourhood to view the said mill site, watercourse, and tenements, and the nuisance thereof done, and the names to be impannelled, and summon them by good summoners, that they be and appear before the judges at *Easton*, at the county Court of Common Pleas, there to be held for the county aforesaid, on the third Monday of *August* next, together with the parties to recognise, &c. &c.; and put by sureties and safe pledges the said *William Barnet* the elder, if he be found in his bailiwick, so that he be and appear then and there before our judges aforesaid, then and there to hear and recognise, &c.; and that he have then and there the names of those pledges, &c. &c.

John Doe and *Richard Roe*, Pledges,

John Denn and *Richard Fenn*, Summoners.

Peter Ihrie, jr., attorney for the plaintiff.

To *Matthias Gress*, Esq., Prothonotary of the Court of Common Pleas.

(Barnet v. Ihrie.)

Northampton county, ss.

The Commonwealth of *Pennsylvania*, to the Sheriff of
Northampton county,

Greeting:—

Whereas *Peter Ihrie* the elder, hath complained to us that *William Barnet* the elder, unjustly and without judgment hath erected, levied, and raised a certain wall and dam, thereby obstructing a certain mill site and a certain watercourse, called the *Bushkill* creek, and hath obstructed a certain other watercourse in the borough of *Easton*, in the said county, to the nuisance of the freehold of him the said *Peter Ihrie* the elder, situate in the same borough and county within thirty years. And, therefore, we command you, that if the said *Peter Ihrie* the elder shall make you secure of prosecuting his claim, then you shall cause twelve free and lawful men of the neighbourhood to view the said mill site, watercourse, and tenements, and the nuisance thereof done, and the names to be impannelled, and summon them by good summoners, that they be and appear before the judges of our Court of Common Pleas at *Easton*, at our county court, there to be held the third Monday of *August* next, together with the parties, ready to recognise, &c.; and put by sureties and safe pledges the said *William Barnet* the elder, if he be found in your bailiwick, so that he be and appear then and there before our judges aforesaid, ready to hear and recognise, &c., and have you then and there the names of those pledges and this writ.

Witness the honourable *Robert Porter*, Esq., president of our said court at *Easton*, the 30th day of *April*, in the year of our Lord one thousand eight hundred and twenty-six.

Matthias Gress, Prothonotary.

Endorsement:—*August* Term, 1825.—No. 28.

<i>Peter Ihrie</i> the elder	} Assize of Nuisance.
v.	
<i>William Barnet</i> the elder.	

(*Ihrie.*)

John Doe and *Richard Roe*, Pledges,
John Denn and *Richard Fenn*, Summoners.

Return of the sheriff to the writ:—

Served the within writ upon the within named *William Barnet* the elder. The residue of this writ to me directed appears in a certain pannel hereto annexed. So answers,

J. Carey, jr., Sheriff.

(Barnet v. Ihrie.)

The pannel annexed:—

Peter Ihrie the elder
v.
William Barnet the elder.

} In the Common Pleas of *North-*
ampton county. Assize of
Nuisance, of *August* Term,
1825,—No. 28.

Sir,

You are hereby informed that the recognitors in the assize, above named, will be and appear at the mill site, watercourse, and tenements in the said writ mentioned, and the nuisance thereof, on Friday the 24th day of *June*, instant, at 10 o'clock, A. M., then and there to view the said mill site, watercourse, and nuisance thereof done. And you are hereby summoned to be and appear before the judges in the said writ mentioned, and then and there ready to hear the recognition above-mentioned.

J. Carey, jr., Sheriff.

June 11th, 1825.

The names of the Recognitors of an Assize of Nuisance between *Peter Ihrie* the elder, plaintiff, and *William Barnet* the elder, defendant:—

1. <i>Thomas M'Keen,</i>	<i>Easton,</i>	Esquire.
2. <i>Philip H. Mattes,</i>	do.	Esquire.
3. <i>John Green,</i>	do.	Lumber Merchant.
4. <i>John Bowes,</i>	do.	Brickmaker.
5. <i>William Ricker,</i>	do.	Carpenter.
6. <i>Isaac C. Wykoff,</i>	do.	Druggist.
7. <i>Michael Simon,</i>	do.	Hatter.
8. <i>Benjamin Hinds,</i>	do.	Manufacturer.
9. <i>Jacob Able,</i>	do.	Boatman.
10. <i>Jacob Weygandt, jr.,</i>	do.	Esquire.
11. <i>Michael Opp,</i>	do.	Esquire.
12. <i>Nathaniel Michler,</i>	do.	Esquire.
13. <i>Moses Davis,</i>	do.	Carpenter.
14. <i>Absalom Reeder,</i>	do.	Merchant.
15. <i>Benjamin Green,</i>	do.	Turner.
16. <i>William White,</i>	do.	Innkeeper.
17. <i>James Sinton,</i>	do.	Clerk.
18. <i>Ralph Tindale,</i>	do.	Carpenter.
19. <i>James Hays,</i>	do.	Innkeeper.
20. <i>Lewis Gano,</i>	do.	Painter.
21. <i>Samuel Shouse,</i>	do.	Esquire.
22. <i>Robert Depui,</i>	do.	Tailor,
23. <i>John Able,</i>	do.	Boatman.
24. <i>John Stewart,</i>	do.	Merchant.

So answers, J. Carey, jr., Sheriff.

(Barnet v. Ihrie.)

Endorsement on the back of the foregoing pannel:—

Copy of the within notice served on *William Barnet* the elder, personally. So answers,

J. Carey, jr., Sheriff.

June 11th, 1825.

In the Court of Common Pleas of *Northampton* county.

Peter Ihrie the elder

v.

William Barnet the elder.

} *August* Term, 1825. Assize
of Nuisance,—No. 28.

And now, to wit, this 15th day of *August*, A. D. 1825, the sheriff of the county of *Northampton* aforesaid, to wit, *John Carey, jr., Esq.*, maketh return, (prouit the writ of assize and the return thereof:) Whereupon the plaintiff exhibiteth his plaint to the court, and calleth upon the defendant to plead thereunto. And thereupon the said defendant, by his attorney, objected to the same being exhibited and filed; and exhibits to the court here, a certain indenture, dated the 22d of *December*, 1804, duly executed and acknowledged between *John Penn* and *William Penn* of the one part, and the said *William Barnet* of the other part, granting and confirming, &c., unto the said *William Barnet*, his heirs and assigns, for the consideration of sixty-eight pounds, fourteen shillings, current money of *Pennsylvania*, two certain contiguous lots or pieces of ground, situate on the north side of *Bushkill* Street and east side of *Hamilton* Street, in the town of *Easton*, in the borough of *Easton*, in the county of *Northampton*, marked in the general plan of the said town No. 273 and 274, also, a certain deed, dated the 25th of *August*, 1821, duly executed and acknowledged in open court, from *Marmaduke M. Michael*, high sheriff of the county of *Northampton*, granting to the said *William Barnet*, his heirs and assigns, for the consideration of six thousand four hundred dollars, a certain messuage and lot of ground, situate in the borough of *Easton*, *Northampton* county, with a three story brick house, and a three story brick kitchen, and a frame shop thereon erected. Also, a certificate under the official seal of the prothonotary of the court, that he has carefully examined the records of the said court from the year 1808, to the 12th day of *August*, instant, and does find no unsatisfied judgments against *William Barnet*; and also a certificate from the recorder of deeds, in and for the county of *Northampton*, under the seal of office, that he had carefully examined the indices of the records remaining in the said office, and cannot find any mortgages on record against the said *William Barnet*. Whereupon, and on motion of *Mr. Sitgreaves*, of counsel with the said *William Barnet*, a rule to show cause why the writ in this case shall not be quashed under the act of the 20th of *March*, 1724-5.

(Barnet v. Ihrie.)

Whereupon the court, having heard the said *William Barnet* by his said counsel, and the said *Peter Ihrie* by his counsel, take time to advise thereon until the first day of the next term of this court; and thereupon, the recognitors of assize being severally called, the following recognitors answer, to wit: *Philip H. Mattes, Michael Simon, Benjamin Hinds, Jacob Able, Moses Davis, Absalom Reeder, Benjamin Green, James Sinton, Ralph Tindale, Lewis Gano, Samuel Shouse, and John Stewart*, and the other recognitors make default; and thereupon the assize is continued until the first day of the next term at 10 o'clock, A. M.

And now, *November* the 21st, 1825, the parties appear by their attorneys, and the court discharge the rule to show cause why the writ issued in this case shall not be quashed: and thereupon the attorneys of the plaintiff read the plaint, and pray that the defendant may be required to plead thereto. And thereupon, the said *William Barnet* by Mr. *Sitgreaves* his counsel, challenges the array, because the persons named in the pannel to the writ of assize annexed and returned to the said writ as recognitors of assize, were not selected, drawn, summoned, and returned agréably to the directions of the act of the 29th of *March*, 1805, entitled, "An act directing the mode of summoning and returning jurors," and of the act of the 24th of *February*, 1806; entitled, "An act to alter the judiciary system of this commonwealth;" which motion being argued, the court take time to advise thereon until Tuesday next at 10 o'clock, A. M., to which time the assize is adjourned. And now, *November* the 24th, 1825, both parties appearing by their attorneys aforesaid, the court overrule the challenge to the array, and assign their reasons, (prout their opinion filed.) And thereupon the plaintiff, by his attorneys aforesaid, calls on the defendant to plead to the plaint of the plaintiff; whereupon the defendant, by his attorney, prays an imparlance, and the same is granted to him until Wednesday, the 30th instant, at 10 o'clock, A. M. The recognitors being called, fifteen, to wit: *Philip H. Mattes, John Green, John Bowes, William Ricker, Isaac Wykoff, Benjamin Hinds, Jacob Able, Jacob Weygandt, jr., Moses Davis, James Hays, Lewis Gano, Samuel Shouse, Robert Depui, John Able, and John Stewart* answer, and the other recognitors make default; and thereupon the assize is adjourned until the 30th instant, at 10 o'clock, A. M. And now, to wit, this 30th day of *November*, 1825, the parties respectively appeared by their respective attorneys: and thereupon the defendant, by *Samuel Sitgreaves* his attorney, comes and craves oyer of the writ of assize, and of the return thereof, and they are read to him, &c. And the same being read and heard, the said *William Barnet* defends the force and injury, when, &c., and says that he is not, and on the day of issuing the said writ, &c. &c.

The pleas are as follows:—

(Barnet v. Ihrie.)

<i>Peter Ihrie</i> the elder	}	Assize of Nuisance.
v.		
<i>William Barnet</i> the elder.		

And the said *William Barnet*, by *Samuel Sitgreaves* his attorney, comes and craves oyer of the writ of assize, and of the return thereof, and they are read to him, &c. And the same being read and heard, the said *William Barnet* defends the force and injury, when, &c., and says that he is not, and on the day of issuing the said writ, or ever after, was not tenant as of freehold of the lands and tenements within, and upon which the wall, and dam, and obstruction, mentioned in the said writ, or any of them have been erected, levied, and raised to the nuisance, as in the same writ is alleged, of the freehold of the said *Peter Ihrie*, and this he is ready to verify. Whereupon he prays judgment of the said writ, and that the same be quashed, &c.

And if not, &c., then the said *William Barnet*, by his attorney aforesaid, defends the force and injury, when, &c., and says that by a certain indenture, made the 28th day of *May*, in the year of Lord one thousand eight hundred and eight, at the county aforesaid, by and between the said *Peter Ihrie* of the one part, and the said *William Barnet* of the other part, reciting that whereas the said *Peter Ihrie* now is, and from the 9th day of *December* in the year of our Lord one thousand seven hundred and ninety-three, hitherto hath been lawfully seised in his demesne as of fee, of and in a certain piece or parcel of land, part of the fulling-mill tract No. 80, situate in the borough of *Easton* aforesaid, containing two acres fifty-nine perches, strict measure, with a creek or stream of water called the *Bushkill* creek running through the same; and that whereas the aforesaid *William Barnet* hath erected a dam across part of the aforesaid creek or stream of water, below the land of the aforesaid *Peter Ihrie*, by means of which said dam the water of the said creek is thrown back upon the land aforesaid of the said *Peter Ihrie*; and (that) whereas an action is now depending in the Circuit Court of the county of *Northampton*, at the suit of the said *Peter Ihrie*, against the said *William Barnet* for the recovery of damages sustained by the said *Peter Ihrie*, by reason of the stopping and throwing back the water by means of the dam aforesaid; and, reciting further, that for the purpose of putting an end to all differences existing between the said parties by reason of the premises, the said *Peter Ihrie* hath agreed to give, and the said *William Barnet* hath agreed to take from the said *Peter Ihrie* a lease for permission to throw back the water of the said creek upon the land of the aforesaid *Peter Ihrie*, as it is at present, and that the suit aforesaid, depending in the said Circuit Court, shall be discontinued on the payment of the costs thereof by the said *William Barnet*. Therefore it was witnessed by the said indenture, that the said *Peter Ihrie*, for, and in conside-

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ration of the rents, covenants, and agreements on the part and behalf of the said *William Barnet*, his executors, administrators, or assigns, to be paid, kept, and performed, as in and by the said indenture was mentioned and expressed; did for himself, his heirs, executors, administrators, and assigns, covenant, grant, and agree, to and with the aforesaid *William Barnet*, his heirs and assigns, that he the said *Peter Ihrie* will permit the said *William Barnet*, his heirs and assigns, to continue to throw back the water of the said *Bushkill* creek upon the land of the said *Peter Ihrie*, as it now is, so far as it respects the interest of the said *Peter Ihrie* in the creek aforesaid, for the space of one year, and from thence until the said *Peter Ihrie* shall have given the said *William Barnet* three months' notice to abate or remove the said back water from the land and the bed of the creek aforesaid. And the said *William Barnet* avers, that the dam in the said indenture mentioned, and the wall and dam and obstruction of which the said *Peter Ihrie* above complains, and unjustly alleges was erected, levied, and raised by the said *William Barnet* to the nuisance of the freehold of the said *Peter Ihrie*, are the same and not divers. And so the said *William Barnet* says that he levied and raised the said wall and dam and obstruction, without wrong and by the license and permission of the said *Peter Ihrie*, as well he might, and this he is ready to verify; wherefore he prays judgment of the said writ, and that the same be quashed, &c. And the said *William Barnet* brings into court, here, the indenture above-mentioned, whose date is the same day and year aforesaid. And if not, &c., then the said *William Barnet*, by his attorney aforesaid, defends the force and injury, when, &c.; and says that the assize aforesaid between him and the said *Peter Ihrie* ought not to be taken, because he says that he did not erect, levy, and raise the said wall and dam, thereby obstructing the said mill site and watercourse to the nuisance of the freehold of the said *Peter Ihrie* in manner and form as the said *Peter Ihrie* hath above thereof complained against him; and of this he puts himself on the assize.

And thereupon, by consent of the parties, the further hearing of the cause is postponed until Wednesday of the second week of the ensuing *January* term, at 10 o'clock A. M., and thereupon the recognitors being called, *Philip H. Mattes, John Green, Isaac C. Wykoff, Michael Simon, Benjamin Hinds, Jacob Able, Jacob Weygandt, jr., Moses Davis, Absalom Reeder, William White, Ralph Tindale, James Hays, Lewis Gano, Samuel Shouse, Robert Depui, and John Able*, answer, and the other recognitors make default, and thereupon the court direct the sheriff to resumon the recognitors to appear on the said day at ten o'clock A. M. And the assize is adjourned until the said 4th Wednesday in *January* next at 10 o'clock A. M.

And now, to wit, this 25th day of *January*, A. D. 1826, the plaintiff appears by his attorneys, *James M. Porter* and *Peter*

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Ihrie, jr., and the defendant appears by his attorney, *Joel Jones*; and thereupon the plaintiff replied to the pleas of the defendant, that the said *William Barnet* the elder did erect, levy, and raise the said wall, dam, and obstructions wrongfully and without the license or permission of the said *Peter Ihrie* the elder, and to the nuisance of the freehold of the said *Peter Ihrie* the elder, in manner, &c. And of this he likewise puts himself on the assize. And thereupon the said sheriff makes return of the writ of resummons, (prout the said writ and return thereto:) Whereupon the recognitors being called, *Thomas M'Keen, Philip H. Mattes, John Green, John Bowes, William Ricker, Isaac C. Wykoff, Michael Simon, Benjamin Hinds, Jacob Able, Jacob Weygandt, jr., Michael Opp, Moses Davis, Absalom Reeder, James Sinton, Ralph Tindale, James Hays, Lewis Gano, Samuel Shouse, Robert Depui, John Able, and John Stewart* answered, and *Nathaniel Michler, Benjamin Green, and William White* make default; and thereupon the defendant by his attorney moves the court, that as the said *Peter Ihrie* the elder has filed no replication to the first plea of the defendant above pleaded (prout the said plea,) nor has given any answer thereto, he prays judgment of the writ, that the same be quashed; and the court after argument overrule the said motion, and thereupon the said defendant, by his attorney aforesaid, prays judgment of the writ, and that the same be quashed; and assigns for further reason, that the matter set forth by his second plea above pleaded (prout the said plea) is not triable by the assize, and that the defendant may of right demand that the issue thereon shall be to the country, and not to the assize, and that he ought not to be compelled to join in the issue tendered so far as it relates to his second plea, nor put the same to the assize, and the court upon argument overrule the said motion. Whereupon the plaintiff, by his attorney prays that the recognitors may be called and sworn to try the matter of assize, which is granted by the court; and thereupon the recognitors of assize being severally called, there answer and come *Thomas M'Keen, Philip H. Mattes, William Ricker, Isaac C. Wykoff, Michael Simon, Benjamin Hinds, Jacob Able, Jacob Weygandt, jr., Michael Opp, Moses Davis, Absalom Reeder, and James Sinton*. Whereupon *Thomas M'Keen* asks to be excused from serving on the assize, and thereupon the parties consenting thereto, he is excused by the court, and the prothonotary calls in his place *Ralph Tindale*, the next named recognitor on the pannel, who answered and came; and they having severally, with the exception of *Michael Simon*, answered that they had viewed the place in dispute between the parties, were severally sworn or affirmed well and truly to try this matter of assize between the parties according to their evidence (the defendant by his attorney objecting to the form of the oath or affirmation,) and charged to inquire, &c.

And now, to wit, *January 28th, 1826*, the recognitors of as-

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size, after being duly sworn, affirmed, and charged according to law, do say as follows,—That the said *William Barnet* the elder, at the issuing of the original writ of assize, viz. the 28th day *May*, A. D. 1825, was tenant as of freehold of the lands and tenements within and upon which the wall and dam and obstruction mentioned in the said writ were erected, levied, and raised to the nuisance of the freehold of the said *Peter Ihrie* the elder, &c. as in the said writ is alleged. That the said *Peter Ihrie* the elder was seised in his demesne as of fee, of and in the said mill site, and a certain watercourse and stream of water called the *Bushkill* creek, and the lands and tenements with the appurtenances in the plaint mentioned, and as therein specified, and as he the said *Peter Ihrie* the elder hath declared; and further the recognitors aforesaid do say that the said *William Barnet* the elder unjustly and without judgment did erect, levy, and raise the wall and dam in the view of the said recognitors placed, and in the said plaint specified, wrongfully and without the license or permission of the said *Peter Ihrie* the elder; thereby obstructing the said mill site, watercourse and stream of water running through and along the land of the said *Peter Ihrie* the elder, to the injury of the said *Peter Ihrie* the elder, and to the nuisance of the freehold of the said *Peter Ihrie* the elder, as he the said *Peter Ihrie* the elder hath complained. And the recognitors aforesaid do further find that the aforesaid wall and dam be removed and abated so as to remove the swelling thereby occasioned at and upon the land of the said *Peter Ihrie* the elder, and reduce and restore the water in the said *Bushkill* creek to its natural current and channel; and the recognitors aforesaid assess the damages of the said *Peter Ihrie* the elder, occasioned by the obstruction and nuisance aforesaid, beyond his costs and charges by him in his suit aforesaid expended, at two hundred dollars, and for his costs and charges aforesaid at six cents.

January 28th, 1826.—Judgment *nisi*.—*Exit hab. fac. sei. cum fi. fa.* *Jan.* 30th, 1826, at half past 12 o'clock A. M.—Writ of error filed *Jan.* 30th, 1826—half past 8 o'clock, A. M.—From the Record.

Matthias Gress, Prothonotary.

<i>Peter Ihrie</i> the elder	}	In the Court of Common Pleas of Northampton county.
<i>William Barnet</i> the elder.		

Opinion.—This is an application to quash the assize of nuisance, because it contains a clause, “and put by sureties and safe pledges, the said *William Barnet* the elder,” when it should have been merely to summon him, as is alleged, on the part of the defendant.

The application is founded on an act to regulate the practice upon writs of summons and arrests. 1 *Penn. Laws*, p. 164, &c.

It does appear, that the defendant is a respectable freeholder in this county. The sheriff has not demanded sureties or pledges of

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Mr. *Barnet*, but has only served the writ upon him. In *England*, this assize of nuisance would be an original to be obtained from the Court of Chancery, which is the *Officina Justitiæ*,—the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king in parliament, sealed with the great seal, and directed to the sheriff of the county, wherein the injury is committed, or supposed to be, requiring him to command the wrong-doer or party accused, either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatsoever the sheriff does in pursuance of this writ, he must return or certify to the Court of Common Pleas, together with the writ itself, which is the foundation of the jurisdiction of that court, being the king's warrant for his judges to proceed to the determination of the cause. For it was a maxim, introduced by the *Normans*, that there should be no proceedings in Common Pleas before the king's justices, without his original writ, because they held it unfit that the justices being only the substitutes of the crown, should take cognisance of any thing but what was thus expressly referred to their Judgment. 3 *Black. Com.* 273.

In this state, this writ of assize of nuisance is procured from the Court of Common Pleas, and the commonwealth of *Pennsylvania* is substituted in the place of the king. The style of all process shall be "The Commonwealth of *Pennsylvania*," *art. 5, sect. 12, Const. of Penn.* This form of writ, in an assize of nuisance, was established in the case of *John Livesay* and *Joseph Livesay*, against *Benjamin Gorgas* and others, to be found in Judge BRACKENRIDGE's *Law Miscellanies*, page 438.

Upon inquiry, we find, that it has been pursued in all subsequent cases. If it is to be altered, modesty would dictate, that the alteration should be made by the Supreme Court. The act of assembly does not apply to an original, it contains these remarkable words: "but that the original process against freeholders shall be a writ of summons." Let us hear what Judge BLACKSTONE says on this subject in his commentaries, (3 vol. page 279.) The next step for carrying on the suit, after suing out the original, is called the process, being the means of compelling the defendant to appear in court. This is sometimes called original process, being founded on the original writ, &c. But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is, by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by summons; which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers called summoners, either in person, or left at his house or land, in like manner as in the civil law. The first process is by personal citation *in jus vocando*. This

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warning on the land is given in real actions, by erecting a white stick or wand on the defendant's ground, &c.; according to the letter of the act of assembly, it is applicable to the process, and not to the original, and a freeholder will be exempted from attachment, finding sureties, and distress infinite, which persons who are not freeholders, would be subject to. Under these impressions, the court discharge the rule.

Easton, Nov. 21, 1825.

Filed, Nov. 21, 1825.

R. Porter, President of the third Judicial District of *Pennsylvania*.

John Cooper, a judge of the Court of Common Pleas of *Northampton* county, *Penn.*

Daniel Wagener, a judge of the Court of Common Pleas of *Northampton* county, *Pennsylvania*.

In the case of *Peter Ihrie* the elder against *William Barnet* the elder, *Samuel Sitgreaves*, Esq., in behalf of the defendant, has challenged the array, because the sheriff has selected the recognitors of the assize. The question is attended with difficulty. The court wish that the legislature had prescribed the course of proceeding in this excellent remedy. But this has not been done; and the court is obliged to encounter the difficulty. The sheriff selected the recognitors in *John Livesay* and *Joseph Livesay* v. *Benjamin Gorgas* and others, reported in 2 *Bin. Rep. Penn.* 192, &c.; and more fully in Judge BRACKENRIDGE's *Miscellanies*, *Penn.* 438, &c. We believe that the sheriff has made such selections in all subsequent cases of assize of nuisance, and therefore, we are constrained to say, that the acts of assembly, concerning jurors, do not apply to recognitors, and decide, that Mr. *Sitgreaves* takes nothing by his motion.

Nov. 24, 1825.

Filed Nov. 24, 1825.

R. Porter, President of the third Judicial District of *Pennsylvania*.

Daniel Wagener, a judge of the Court of Common Pleas of *Northampton* county, *Pennsylvania*.

Plaint.—In the Court of Common Pleas of *Northampton* county.

<i>Peter Ihrie</i> the elder	}	Of August Term, 1825. No. 28.
v.		
<i>William Barnet</i> the elder.		

The assize cometh to recognise, if *William Barnet* the elder hath erected, levied, and raised a certain wall and dam, thereby

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obstructing a certain mill site, and a certain watercourse, called the *Bushkill* creek, and obstructed a certain other watercourse, in the borough of *Easton*, in the county of *Northampton*, to the nuisance of the freehold of *Peter Ihrie* the elder, situate in the same borough and county, within thirty years now last past; and therefore the said *Peter Ihrie* the elder, by *James M. Porter*, his attorney, complains that the said *Peter Ihrie* the elder, on the first day of *January*, in the year of our Lord one thousand eight hundred and six, was and still is seized on his demesne, as of fee, of a certain water mill site, and two acres and fifty-nine perches of land, situate in the borough and county aforesaid, together with a certain water course and stream of water, called the *Bushkill* creek; running through and along the said land from the said mill site, so that at the said mill site upon the said land, before the levying of the said wall and dam, there could be had, and was a fall of six feet four inches, of and upon the said watercourse and stream of water, to be applied to the driving of water wheel, propelling mill works and machinery, and the said *Peter Ihrie* the elder being so thereof seized, the said *William Barnet* the elder on the day and year aforesaid, at the county and borough aforesaid, unjustly and without judgment levied and raised a certain wall and dam, thereby obstructing the said mill site and water course, and the said stream of water running therefrom, through and along the said land, by reason whereof the said land is overflowed, and the said mill site injured, and the fall thereof and of the said watercourse, is reduced to four feet, and the power thereof diminished, so that the same could not and cannot be applied, as it otherwise could and would have been, and still would be applied to the driving of a water wheel for propelling mill works and machinery, and so he the said *Peter Ihrie* the elder, saith he is injured, and hath sustained damage to the value of three thousand dollars, lawful money of the *United States*; and therefore he bringeth this assize.

John Doe

v.

Richard Roe.

}

Pledges to prosecute.

Resummons.—*Northampton* county, ss.The Commonwealth of *Pennsylvania*, to the Sheriff of *Northampton* county,

Greeting:—

We command you that you cause to come before our Justices of the Court of Common Pleas to be holden at *Easton*, in and for the county of *Northampton*, the twenty-fifth day of *January* next, at ten o'clock in the forenoon of that day, *Thomas M'Keen*, Esq., *Philip H. Mattes*, Esq., *John Green*, lumber merchant, *John Bowes*, brickmaker, *William Ricker*, carpenter, *Isaac C. Wykoff*, druggist; *Michael Simon*, hatter; *Benjamin Hinds*, manufacturer; *Jacob Able*, boatman; *Jacob Weygandt, jr.*,

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Esq.; *Michael Opp*, Esq.; *Nathaniel Mickler*, Esq.; *Moses Davis*, carpenter; *Absalom Reeder*, merchant; *Benjamin Green*, turner, *William White*, innkeeper; *James Sinton*, clerk; *Ralph Tindale*, carpenter; *James Hays*, innkeeper, *Lewis Gano*, painter; *Samuel Shouse*, Esq., *Robert Depui*, tailor; *John Able*, boatman; and *John Stewart*, merchant; who were summoned and returned by you as recognitors of assize, in a certain plaint of assize of nuisance, wherein *Peter Ihrie* the elder is plaintiff, and *William Barnet* the elder defendant, in our said court prosecuted, so that the said recognitors of assize may recognise and pass on the said plaint of assize between the parties aforesaid, and have you then and there this writ together, with the names of the said recognitors, as you shall answer.

Witness the honourable *Robert Porter*, Esq., president of the said Court of Common Pleas at *Easton*, the 30th day of *November*, in the year of our Lord one thousand eight hundred and twenty-five.

Matthias Gress, Prothonotary.

Sheriff's return:—

I do certify, that, by virtue of the within writ, I have summoned the within named recognitors; to wit, the several recognitors within named, to be and appear at the time and place within mentioned, as within I am commanded. So answers,

J. Carey. jr., Sheriff.

Specifications of errors.—

1. The Court of common Pleas should have quashed the writ of assize, it being contrary to the act of the 20th of *March*, 1724-5, entitled, "An act to regulate the practice upon writs of summons and arrest."

2. The court should have sustained the challenge to the array, because the recognitors were not legally impannelled.

3. The writ of assize issued below, is defective in form and substance, and without precedent.

4. The plaint does not allege the seisin, &c., to have been in the plaintiff at and before the erection of the alleged nuisance; and it is consistent with the said plaint that the seisin, &c., had ceased before the said erection, or had been acquired thereafter.

5. The plaint does not allege the violation of any such seisin, as the writ of assize of nuisance is legally competent to remedy, but alleges imperfectly, inartificially and improperly, seisin of the water fall site and watercourse.

6. The court should have quashed the writ for want of answer to the first plea, according to the prayer of the conclusion of it.

7. The court should have quashed the writ for want of answer to the second plea, setting forth an indenture, &c.

8. The judgment *quod capiatur assisa* was not given by the court.

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9. The recognitors of assize were not duly sworn.

10. The verdict is insufficient to support any judgment:—1. The recognitors do not inquire of the force. 2. The matter of the first plea should have been found at large, divested of all questions of law, as to what is freehold, and what is not. 3. The matter of the second plea should have been specially found.

11. The recognitors had no right to assess damages under the oath taken by them.

12. The judgment ought not to have been entered, “*nisi*,” nor, except on motion in open court,

13. The writ of “*habere facias seisinum*” is not the proper execution in assize of nuisance.

14. The execution issued prematurely, and ought not to have issued without motion in open court.

15. The plaint is erroneous in counting for damages.

Jones, for the plaintiff in error.

The remedy by assize has been long in disuse. If it still exists it is *strictissimi juris*, 1 *Bos. & Pull.* 192, 11 *Serg. & Rawle*, 275; and if revived must be conducted on the principles, and in the forms of the old books, the only source of authority on the subject. It is a part of the *jus antiquum*, according to *Butler, Pref. Co. Litt.* 8vo, 13th Ed.—*Reminiscences*, p. 97. It was best understood in the reigns of the first three *Edwards*, between A. D. 1272, and 1377. *Hale's Hist. C. L.* 175. From the end of *Ed.* 3, it began to decline; and in the reigns of *Hen.* 6, *Ed.* 4, & *Hen.* 7, was less known, and land titles came to be determined in personal actions, *Hale's Hist.* 176, cap. 8. Ejectment was used to recover a term, as early as the 14 *Hen.* 7, A. D. 1499. *Hale's Hist.* 175. *Adams on Eject.* 8. 4 *Dall.* 140. This new use of the action, originated in the King's Bench, and was designed by that Court to get concurrent jurisdiction with the Common Pleas, in matters of real property. *Adams*, 9. The facilities it offered soon brought it into general use. Recognitors in assize could as such inquire only of the points of assize, and must find on their personal knowledge, 3 *Bl. Com.* 402, *Glanv.* 69, 64, 65, 67, 60, 61, *Steph. on Pl.* App. 51. note 44, and a *jurata* was often necessary to supply defects in their power. In ejectment the tribunal of fact was a *jurata* who were competent to inquire of any matters however multifarious, and were not restricted to find on their personal knowledge. *Worthington on Juries*, 114, 115, *Fortesc. cap.* 26. Add to this, the *Statute of Uses*, 27, *Hen.* 8, changed the whole exterior of conveyancing. Feoffment with livery—grant with attornment—exchange with entry—lease with entry, (notorious facts to which only recognitions were adapted,) were superseded, and the seisin, (or feudal possession,) which was the only subject of a recognition, (See *Glanv.* 5, 304, 311. *Fleta*, lib. 4, cap. 1, sect. 7, p. 213,) could be ascertained only through

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the medium of deeds of which recognitors could never inquire. *Fleta*, Lib. 5, Cap. 6, sect. 55, p. 303, Lib. 4, Cap. 10, sect. 2, p. 233. Certain it is, that soon after this change in the action of ejectment, the assize was but little resorted to; and, in 7 Ed. 6, A. D. 1554, *Plowd.* 89, the course of the action was so far forgotten, that both counsel and the court erred in a matter that must have been familiar to practitioners of the days of *Edward* 3, and the error was corrected by authorities from 23, and 26 assizes in *Edward* 3, decided more than 200 years previous, which shows that the intermediate period was not replete with decisions on the law of assize. It is doubtful whether the assize can be revived for practical purposes. Printing with fusil types was not introduced into *England* till 1475, about a century after the decline of assizes. The old *Liber Intrationum* was not published till A. D. 1510, and the *Register*, not till some time after, *Steph. on Pl.* 7, and these books would probably be printed as early as any other. Much of the minute and practical in the law of assize, it is probable, was never committed to print. If, however, the entire system is extant, it is to be found in *Glanville*, *Bracton*, *Fleta*, *Britton*, and cotemporary writers, and in the reports previous to *Henry* 6. Later writers supply but little on the subject, and that little is of less authority. *Littleton* wrote in the time of *Edward* 4. when the learning of assize was less known and the actions less frequent, *Hale's Hist. Com. Law*, 175.

I begin with the seventh exception. The court should have quashed the writ for want of answer to the second plea, setting forth an indenture, &c. No notice is taken of this plea, unless the words *without license and permission* prefatory to the plaintiff's joinder in issue on the third plea, are such. But this at most is denial of the defendant's inference as to the law, and bad, *Steph. on Pl.* 215. 1 *Saund.* 23, (n. 5.) It is a traverse of effect, not of fact, and therefore admits the fact, and the plaintiff is for ever estopped from denying the fact; even in another suit, *Steph. on Pl.* 234. The recognitors or jury, were estopped to find the contrary, *Bull. N. P.* 258, 2 *Rep.* 4; and if on demurrer the court would have barred the assize, they will do it on the present state of the pleadings, as is proved by the reason or ground of the practice of entering judgment, *non obstante veredicto* which takes place where the plea confesses the action, but does not sufficiently avoid it, *Tidd's Pr.* 828. Here is implied confession of the whole, without avoidance of any thing. And whether the true inference of the law is deduced in the conclusion of the plea, viz. license and permission, is of no consequence; for if in any way it can defeat the action, the court will *ex officio* so declare it, notwithstanding any inaccuracy in deducing the legal inference, *Plowd.* 66. This plea shows *prima facie* a right in *Barnet*, (which is enough, *Steph. on Pl.* 354,) and nothing appears in any part of the record to show that the right is not still sub-

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sisting. It might have been terminated by three months' notice. But if such notice had been replied, the replication would have been demurrable, which shows that the assize was not the legal remedy. Assize of nuisance lies only for a tort. It sounds in force of which the recognitors must *ex officio* inquire. *Booth on R. A.* 288. *Co. Ent.* 92, b. *Lib. Intrat.* 122. *Brac. Law Misc.* 457. It is penal in its consequences, *Fleta Lib.* 4, *Cap.* 28, *sect.* 1. *page* 270. The cause of action in this case, if any thing, must have been non-compliance with the contract, a breach of the covenant, in neglecting to remove on three months' notice. But assize of nuisance lies not for a neglect—a *nonfeasance*. *Bro. Abr. Nuis.* pl. 9, 16, 31, *Tit. sur le case*, pl. 44. 2 *Roll. Abr.* 141. *Tit. Nuis. Assize*, H. pl. 7, 8, 9. *Com. Dig. Tit.* Action on the case for a nuisance, (D. 1.) *Fitz. Nat. Brev.* 83, *note* (a.) The effect of the indenture made in 1808, was retrospective—it legalized the erection, and was a release, or accord and satisfaction of the original claim for damage in 1806, see 2 *Ev. Poth.* 164. *Ihrie* could not after the execution of the deed treat *Barnet* as a tenant or trespasser at his election, and re-convert a breach of the agreement, into the original trespass expunged by it. As it regards, therefore, the question of remedy, the erection was thereby made lawful *ab initio*; and so an erection by license and permission, which is a valid defence. *Fleta, Lib.* 4, *Cap.* 3, *sect.* 8. *Cap.* 28, *sect.* 15. *Cap.* 26, *sect.* 3, pp. 220, 273, 267. It was in law an *abatement* of the nuisance, for the erection was thereafter rightfully maintained; and it is a good plea that the plaintiff at any time, (or defendant before writ purchased,) has abated the nuisance, *Rep.* 55. *Bro. Nuis.* 8, *tit. Action sur le case*, 29, 16, *Vin.* 42, pl. 12, p. 31. (I. 2.) pl. 1, in margin: and this inference might have been deduced in the conclusion of the plea instead of license and permission. The plea certainly set up a defence to the claim for damage, from 1806; for it shows a grant of the privilege, for a stipulated sum, since 1808, and shows in effect a release or accord and satisfaction as to all before 1808. Another circumstance demands notice. This plea tendered no issue—it would have been demurrable if it had, because it set up new matter. Of course *joinder in issue* on it was impossible. The plaintiffs *joinder in issue*, therefore, though informal, (see *Plowd.* 91. *Co. Ent.* 92, b. 61, b.) can refer only to the third plea, because he says, that he *likewise* (i.e. in the like way) puts himself on the assize, but the conclusion of the second plea is to the court. If the *similiter* is referrible to the third plea only, the second plea is unanswered; if to the second as well as the third plea, (it being nothing more than a *joinder in the prayer at the conclusion of each plea*,) it is as to the second plea equivalent to a demurrer, which admits, as this plea does, the fact, but denies the effect. In any other view the defendant would be injured. He could not demur, after issue joined, for a demurrer is properly an excuse for not pleading on to issue. 3 *Tho. Co. Lit.* 438. He

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could not strike out the *similiter*, and then demur, for it was not his part to add it. And thus mere matter of law expressly referred by him to the judgment of the court, was, in spite of him, referred to the recognitors for their judgment, in direct violation of the maxim *ad questiones juris non respondent juratores*. The plea concludes with prayer of judgment that the writ be quashed. The same was repeated *ore tenus* after the last pleading was put in. This was the proper method. See *Fleta*, lib. 5, cap. 6, sect. 44, p. 301, for the ancient practice, which, however, is proved by the pleadings in assize.

Exception 6th. The court should have quashed the writ for want of answer to the first plea, according to the prayer at the conclusion of it.

Assize of nuisance is a real action. It lies only between freeholders. 3 *Bl. Com.* 222. 1 *Bin.* 251, 253. *Fitz. Nat. Brev.* 185. *Arch. Dig.* 28. 9 *Serg. & Rawle* 367. If either plaintiff or defendant be not tenant of the respective freehold, the defendant may plead the fact. The question of the plaintiff's freehold is, however, a part of the contents of the general issue, which is, "nothing levied to the nuisance of the plaintiff's freehold." 16 *Vin.* 42, pl. 10; and it seems therefore unnecessary to plead it specially, where the general issue is also pleaded. But it is otherwise as to the question, whether the defendant has a freehold in the land on which the nuisance is. The general issue raises no question as to this, and the defendant must plead the fact if he would have the benefit of it. This is a material distinction. The former, on the plea of *nul tenant* if pleaded, need not be answered—the latter, or plea of *non tenure*, must be; and the distinction supplies a reason for the rule. The plea in question is *non tenure without disclaimer*. It is really a bar, though often called a plea in abatement. It gives not a better writ. It denies the defendant's liability to the action. 2 *Saund.* 44, note 4. *Gilb. C. P.* 250. *Thel. Dig. lib.* 11, cap. 22, sect. 4. It must be answered. In *Fleta*, lib. 5, cap. 6, sect. 44, a form of this plea is given, and the author adds *et quo comperto vel non dedicto cassabitur breve*. He then gives two forms of replication. The words, "or not denied," and the fact that forms of replication are given, prove the position. If *non tenure* of parcel is pleaded, tenure of the residue is admitted by implication, and the plaintiff may abridge his plaint to the parcel admitted, which abridgment confesses the defendant's plea. 2 *Saund.* 44, note 3. *Gilb. C. P.* 249, 253. *Thel. Dig. lib.* 8, cap. 28, sect. 15, *Bro. Tit. Abr.* 12. *Non tenure with disclaimer*, in a real action in which damages are not recoverable, compels the plaintiff to take judgment and have execution at his peril, for *frustra fit per plura quod fieri potest per pauciora*.

Otherwise if damages are recoverable; for then the plea must be *without disclaimer*, which puts the plaintiff to his election of two courses, viz. to enter judgment and have execution at his peril,

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which would be a waiver of his claim for damages, or if he will have his damage, he must have his writ, that is, he must aver that the defendant is tenant of the land, as his writ assumes, and go to trial. *Gilb. C. P.* 249. *Co. Lit.* 362. *a. b.* 10 *Went. Pl.* 211. note from Serjt. *Hill*. This averring the writ as it is defined in *Co. Lit.* 362, is a traverse of the plea, (and this shows the plea to be a bar to the action;) it was the answer requisite to the attainment of damages, and without which it is expressly said in *Co. Lit.* 362, he would lose them, and judgment therefore is erroneous. As the plaintiff chose not to aver his writ, he should have waved his damage, and taken judgment, (viz. the judgment prayed by the plea,) and issued execution at his peril. See *Bro Judgment*, 132, for the nature of the judgment. Suppose, however, the plaintiff was right in his position that the first and second plea required no answer, our next proposition is, that on that supposition, they should have been found specially and at large. 10th *Exception*, 2d and 3d *Specifications*. This is proved by the most obvious principles and express authorities.

If special matter be pleaded in abatement or in bar, the assize shall be taken at large. *Com. Dig. Assize, B.* 19. To take the assize at large, is to take a *special verdict*. *Booth*, 212, 213. Here is no special verdict. Non tenure, it is true, can neither be pleaded nor found specially, it being a mere negative; but *tenure*, which the recognitors here have found is an affirmative, and the acts or facts constituting the supposed title or estate holden, admit of a special finding, so as to leave the question of law whether they constitute a tenancy of the freehold or not to the court. There is no finding at all on the second plea, for the whole residue of the verdict is merely a tautological finding of the general issue. General principles are violated by the course pursued in this case. It is a curious feature of the law of assize that it allows not answers to pleas of a certain description; yet such is the fact. What these pleas are it may be difficult in some cases to determine; but that being ascertained there is no difficulty in showing that all such must be specially found. The object of pleadings is to furnish a medium for the application of the principle *ad questiones juris non respondent juratores*. So far as the parties agree upon the facts in their pleadings, (which they may do wholly or in part,) the office of the jury is superseded, and the jury is estopped to find the truth even against the state of the facts as detailed and conceded in the pleadings. *Ham. Anal.* 21. 2 *Rep.* 4, *B. N. P.* 298. Hence demurrers to declarations—to pleas—to evidence. Hence the special traverse, the general issue concluding with an *issiat*, the object of which prevents the law arising from the fact from going before a jury. *Steph. on Pl.* 201. And these forms of pleading, for this reason were very common before the practice of granting new trials. *Ham. Anal. of Pl.* 13, 14. Judgments *non obstante verdicto* and the power of the court to control the jury on the com-

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pound or complex issues, show it the constitutional power of the court to decide the law. *Willes*, 583. *Vaughan*, 135. *Bushel's* case. There is no equivalent in the law of assize by which this object may be attained in regard to pleas not answerable, but the special verdict, and without this the recognitors become uncontrollable arbiters of the law arising on such pleas. In this case the question of freehold raised by the first plea is a mere question of law, and the colourable matter usually pleaded in assize involves this question. *Steph on Pl.* 193, 228, 230, 231, and colour to be good must be doubtful, *lay gents* or the jury. *Arch. Dig. Pl.* 212. A series of inferences results from the position that these pleas were not answerable. They were not demurrable, *Plowd.* 91. *Booth*, 270, consequently they could not be proved or disproved by testimony, for *frustra fit per plura quod fieri potest per pauciora*. See *Bl. Com.* 402. The court could not charge, not knowing the facts, nor grant a new trial or recognition *de novo*. There is no example of a recognition *de novo*, new trials having come in lieu of attainments, which went into disuse with recognitions. Nor would a recognition *de novo*, meet the exigency of a supposed error not in the recognition, but in a plea collateral to it. But suppose evidence adduced under these pleas, it could not be demurred to, for the plea itself is not demurrable. *Plowd.* 91. In short, the court can take no notice of such pleas till after verdict found on them. *Plowd.* 89, *et seq.* proves this. In that case the plaintiff demurred improperly to a plea of this description. The court, after argument and consultation, sustained the demurrer. Then the plaintiff discovered his error, yet the court put it to the recognitors to inquire of this plea, and it is absurd to suppose they admitted testimony and charged on a plea which they had already adjudged idle. Anciently the maxim *ad questiones, juris*, &c. was adhered to with great strictness. The assize could not decide on the law connected with disseisin, though involved in the general issue. *Worth. on Juries*, 118, 119. *Glanv. Lib. 2, Cap. 6, p. 61*. The *Stat. of West. 2, Cap. 30*, however, declares that if the jury will of their own head say it is disseisin, their verdict *shall be admitted at their peril*. *Rob. Dig.* 326. The *peril* attached to the performance of this act, amounts to a restriction upon the performance. With much less plausibility can it be contended that they could decide the law arising from collateral matters. See *Worth. on Juries*, 119, 173, 174. They do, however, unless they render a special verdict. But waving the argument thus far, the oath "well and truly to try this *matter of assize* according to the evidence," does not comprise these pleas, which are collateral to the assize; and so the finding on them, if otherwise unobjectionable, was not under oath. (9th Exception. In regard to all matters collateral to the assize, or not of the point of assize, the recognitors could act only as a *jurata*, and should have taken the juror's oath. *Booth*, 210, *pl. 10, pp. 213, 214*. When the assize is taken at

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large the recognitors are sworn as a common jury. *Com. Dig. Assize*, 13, 19. *Fleta*, lib. 4, cap. 11, sect. 12, p. 238. Attaint was founded on the recognitor's oath, which comprises the general issue only, or the points of assize. 3 *Bl. Com.* 402, 3. *Fleta*, lib. 4, cap. 1, sect. 7, cap. 9, sect. 8, cap. 10, sect. 2, cap. 17, sect. 9, pp. 213, 231, 233, 248.

The oath is otherwise objectionable. It is not the oath prescribed by the ancient law; for which see *Fleta*, lib. 4, cap. 9, sect. 1, p. 230. *Worth. on Juries*, 86, 7. The ancient oath was administered in 3 *Wils.* 541. *Litt. sect.* 514. The oath in this case, is evidently formed on the modern juror's oath. It omits, however, the phrase, "and a true verdict give," which hath its equivalent in the ancient oath. No ancient oath can be altered or new one imposed but by act of parliament. 2 *Inst.* 479. 3 *Inst.* 165. Either the ancient oath, or the oath prescribed by the act of assembly, 4 *Smith*, 329, should have been adopted. Courts cannot compel a juror to take an oath unknown to the law. The principle assumed in this case is legislation, and would authorize the devising of an oath on every trial. This oath is also defective in this. It does not comprise the question of damage. (11th *Exception*.) Damages are not of the *matters of assize*. The assize is taken at large when the recognitors inquire of the damages. *Booth*, 213, pl. 10, 2. This error is traceable to another, that of counting for damages. (15th *Exception*.) The whole duty of the assize is specified in the recital of the writ in the plaint, viz. to inquire of the plaintiff's freehold, the wrongful act, and whether the act is a nuisance. *Co. Ent.* 92, a. The plaint is merely an amplification of the writ. In the conclusion the nuisance is assigned in particular, but no sum in damages is demanded. So are all the plaints, *Lib. Intrat.* 122. *Rastal's Ent. Browne, Dec. & Pl.* 67. Which shows that assessing damages is not part of a recognition. But it is itself error. In *Pilford's case*, cap. 9, 10 *Rep.* 117. a. it is said that in real actions the demandant shall never count of damages. *Booth*, 75, note 2, *Burr.* 1086, 7. The course of the proceeding is detailed in *Fleta*, lib. 4, cap. 9, p. 230, from sect. 1, to sect. 9. In sect. 9, it is said after judgment as to the assize, the justices inquire of the damages. The inquiry of damages was therefore premature. The defendant was not bound to come prepared to go into it at that time, as he could not know any other course of proceeding than that detailed in the books.

The verdict is also defective. The recognitors did not inquire of the force. (10th *Exception*—1st *Specification*.)

In *Booth*, 288, this omission is declared to be error. All the entries show that this inquiry has been made, although the force be not put in issue. *Co. Ent.* 92, b. *Lib. Intrat.* 123. *Livesay v. Gorgas*, *Brack. L. M.* 457, which are cases of assize of nuisance. So, *Co. Ent.* 60, b. (the entry in *Webbe's case*, 8 *Rep.*) *Booth*, 294. The reason of the rule is, that the law presumes

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prima facie that the act was done with force, and therefore has made the remedy *festinum*. *Fleta*, lib. 4, cap. 5, sect. 8, p. 223. But it gives the defendant the benefit of having it inquired of, and the judgment at common law varies according to the finding. If force be found, the judgment is a *capiatur pro fine*. *Lib. Intrat*. 122, 3. If negatived, the judgment is a *miserericordia*. *Co. Ent*. 92, b. Neither of these judgments (the only forms at common law) can be entered, for the law does not presume that there was no force from the omission in the verdict, as it does in trespass. *Bro. Assize*, 67. This defect cannot be cured by verdict, as it arises on it. The statute 16 and 17 *Car. 2*, cap. 8, *Rob. Dig.* 39, 40, does not apply to this case. It gives the court power only to amend, and of course applies to amendable errors only. In this case either judgment would be incongruous with the previous part of the record. No legal judgment could be entered, but judgment *nisi* was certainly improper. (12th *Exception*.) It is obvious that the provisions of the judgment must be adapted to the state of the fact, and the nature of the nuisance, and must therefore be in definite and precise terms. Hence, on this view, the plaintiff must show the jurors, *de eo quod nocet qualecunque sit illud vel quantum vel per quas metas ut certa res in judicium reducatur*. *Fleta*, lib. 4, cap. 27, sect. 19, pp. 269, 270. The redress is specific, by prostration, rebuilding, repairing, opening, ad-measuring, so as to conform to the ancient state in height, breadth, length, depth, narrowness, &c. *Fleta*, lib. 4, cap. 28, sect. 4, p. 270. Sir William Blackstone supposes that the remedies of the ancient law contain an equivalent for the specific remedies of chancery. 3 *Com.* 52. The courts, in ancient times, pronounced their judgments in actions of assize of nuisance with great deliberation upon the case settled by the verdict. *Fleta*, lib. 4, cap. 9, sect. 8, p. 231. *Worthington on Juries*, 95. In no real actions can judgment be entered without motion in open court. 3 *Caines*, 139. The practice adopted in this case is exceedingly dangerous. In dower, and in those real actions where the judgment is executed by a writ of *Habere fac. seis.*, there is little danger: the realty remains, but the execution in this case is destructive, and should not be moulded by the party to suit his own views. A house, a mill, or a dam may be reduced to ruins, when the judgment of the court would require but a slight alteration. Admitting, therefore, that in those real actions to which a general form of execution is applicable, and which effect only a transmutation of possession, a judgment in this form would be good; the peculiarity of this action of assize of nuisance is one in principle, and is sufficient to bring it within the rule contended for.

2nd Exception. The writ of assize is defective in form and substance, and without precedent.

This exception touches a vital part of the case, and, if tenable, must be fatal. Original writs are the subjects of legislative en-

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actment; they were all established and approved by the common council of the whole realm, and can (*nulla tenus*) in no respect be altered. *Co. Litt.* 73, *b.* and authorities there cited. See *8 Rep. Preface*, *8 Rep.* 63. The originals were essential to the due institution of the suits, and limited and defined the action itself. Anciently no case was remediable to which the language of some known writ did not apply, and hence the enumeration of writs and that of actions became identical. *Steph. Pl.* 8. This writ contains the clause that the defendant be put, &c. to appear and recognise. This is not the object of the original in assize. The object of the appearance is to hear the recognition. See *Co. Ent.* 92, *a.* *Glanv.* 336, *et passim*. This is a variance in substance. See *Glanv.* 278, (*note*), and is fatal. *Cro. Eliz.* 462. It omits the phrase in the original writ, *vel ballivum si ipse non inventus est*, and the defendant has a right to appear by bailiff in assize. *Com. Dig. Assize*, *B.* 8, *p.* 563. *Fleta*, *lib.* 4, *cap.* 5, *sect.* 8, *p.* 223. *Fitz. Nat. brev.* 177. *F.* 2 *Inst.* 415. *Glanv.* 336, 278, *note* (2.) Another objection is, that the writ in this case has no precedent. It may be described an *action of assize of nuisance on the case*, which is a novelty. All writs of assize of nuisance are *brevia formata*. The want of power to form writs upon the circumstances of the case, occasioned the statute of *Westminster*, 2 *cap.* 24. *Rob. Dig.* 157. This statute gave the power of forming writs to the clerks in chancery only; and to them only in cases closely analogous to existing writs, *in consimili casu*. It has long since been expended. No new writs at the present day can be formed by authority of it. *3 Bl. Com.* 52. The general form of the modern action on the case, was devised by the clerks to provide for all the cases similar to those provided for by formed writs in assize of nuisance, and it is this mode of executing the power given to that state, which Sir *Wm. Blackstone* regrets. And not only were the similar cases provided for in this way, but the formed *brevia* in assize then existing, have been converted into the action on the case. This conversion of formed writs into actions on the case, was, for some time, resisted, but was long since fully established. *Ham. N. P.* 8, 30, *note*. 4 *Co.* 94. *Yelv.* 21. *Cro. Eliz.* 198, 199, 520, 845. This is a writ of assize, for obstructing a watercourse. There is no such writ: 2 *Roll. Ab.* 144, (*P.*) *pl.* 6, 16 *Vin.* 37, *pl.* 6, are authorities in point. The register of writs contains no such writ. See *pp.* 197, 199. *Fitz. N. B.* 183, 184. The objection of novelty is not new. It was taken to a writ of assize of nuisance in 22 *Hen. C. A.D.* 1444, about one hundred and fifty-nine years after the 13th *Ed.* 1. 1 *Fitz. N. B.* 183, *note* (*a.*) 2 *Roll. Abr.* 144, *A.* (1.) And the objection is universally applicable, except to the single form of the action on the case, which owes its origin to the principle on which this objection is founded. *Willes*, 580, 581. *Winsmore v. Greenbank*, see 2 *Lord Raym.* 938. *Co. Litt.* 81, *b.* and *note* 49, by Mr. *Hargrave*.

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Another objection to the writ may be discussed in connexion with the *5th exception*; viz. that the plaint does not allege any such seisin, as the writ of assize of nuisance is competent to remedy, but alleges imperfectly, inartificially, and improperly, seisin of the water *mill site* and watercourse. The plaint or count, is the plaint of the writ amplified. No writ, of course, exists for the case, if the assize is not applicable to such seisin, as is alleged. The seisin in assize must be in *demesne*. Real actions are divided into four classes, corresponding with the four kinds of seisin. *Booth, Introd. pp. 2, 3*; viz. seisin, (1) as of fee, demesne, and rights, (2) seisin as of fee and rights, (3) seisin as of fee and demesne, (4) seisin as of demesne. *Fleta, Fet Assavoir, p. 446, sect. 14*. See *Glanv. 39, note*. Writs of assize of *Nov. Diss.*, and writs which begin *Si a te fecerit securum*, are applicable only to seisin in demesne. The writ of assize of nuisance is of this class. *Fleta, lib. 4, cap. 28, sect. 8, p. 271. Davis's Rep. 151*. See *Plowd. 154*, and *Fleta, lib. 5, cap. 10, sect. 1, p. 316*. A man cannot be seised in demesne of any thing incorporeal. *2 Bl. Com. 106, 107*. Seisin in demesne applies to such property only as can be subjected to some service, and not to a service to which corporeal property is subjected. See *1 Bart. Elem. Con. 58, note*. The *dominicum* may be in one while an appendage or service is in another. *2 Bl. Com. 104. Non dominici pais est usufructus. Fleta, lib. 4, cap. 31, sect. 9, p. 277, also p. 261, sect. 8, cap. 22*.

Take this case as an example.—The defendant, *Barnet*, may be seised *as of fee* of the alleged water power, on the land of which the plaintiff, *Ihrie*, is seised in *his demesne* as of fee, and nothing inconsistent with this supposition is averred. Hence, in the action on the case, after alleging seisin or possession, it is necessary to aver, in order to exclude this inference or conclusion, that by reason thereof, the plaintiff ought to have the benefit of the current, &c., as in *1 Saund. 346, note (2), 8 Wentworth, 535*, or prescribe in a *que estate*, as in *Lil. Ent. 62; Co. Ent. 92*.

An incorporeal right must be annexed to freehold in demesne, and so a part of it, otherwise the assize is not applicable. If it be in gross, assize lies not, but covenant, or case. *2 Roll. Abr. 141, 142. Ass. H. pl. 12, 13*. A man cannot be seised in his demesne of a stream of water, *2 Bl. Com. 18*, nor bring his action to recover possession of water by the name of a pool or watercourse. A watercourse is a thing quite distinct from the land. *1 Wils. 175. Poph. 166*. So of the mill site. This is not alleged *qua* land, but as a possible use of the stream *and* the land. The stream, or rather the *impetus* of the stream, is the thing of value, and the invasion of the plaintiff's property in it, is evidently the *gravamen* of the plaint. Undoubtedly a man may grant the rights of erecting a mill on his land between given points, (see *Angell, 10*), and this would be the grant of a *mill site*, and yet, (notwithstanding such a grant,) the *demesne* would still remain in the grantor,

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and a use only be parted with, of which the grantee might be seised as of fee, but not in demesne. The precedents of this action all show an actual present injury done to some *corporeal* tenement, of which seisin in demesne is with propriety alleged. *Co. Ent.* 92. *Lib. Intrat.* 122. *Rastal Entr.* See also *Bro. Abr. Nuis.* pl. 16, 14, 19, 18. Action *sur le case*, 57. But, again, this action is never applied to nuisances, which are not by law abateable, although the action on the case often is; and this is a characteristic distinction between the action on the case and the assize of nuisance. The rule on the subject of redress by act of party is laid down in 4 *Burr.* 2428, and in 1 *Burr.* 265, 267, and restricts this mode of redress to actual palpable injuries, requiring no exercise of judgment. In 9 *Rep.* 55, (a.) redress by act of the party, and assize, are spoken of as co-ordinate remedies. See also *Cro. Car.* 184, 185. *King v. Wharton*, 12 *Mod.* 510. If a way be only narrowed, case lies; if wholly stopped, assize of nuisance lies. *Bro. Nuis.* pl. 3, 13. 2 *Roll. Abr.* 144. *Nuis. (P.)* 4. (R.) pl. 3, p. 142. (H.) pl. 16. In the latter case the party may also abate; in the former he cannot. I argue from the coincidence. The cause of this distinction is supplied by the history of the origin of the writs themselves. When every writ was the result of legislative enactment, the grosser and palpable injuries would be naturally the first objects of attention. Mills would be provided for before mill sites, and actual uses before possible and prospective uses. A man's visible and productive freehold rather than his purposes. The catalogue of grosser injuries was not exhausted when the compendious and general form of the action on the case was devised by the clerks, into which the whole residue of similar injuries was thrown. This mode of providing for them, was in some measure dictated by necessity. To have pursued the mode of legislation for each particular case, into the wide field now occupied by the action on the case, would have swelled the register to many volumes. Chief Justice HOLT's reasoning in 2 *Lord Raym.* 958, applies, and is applied by him to the action on the case. It is not true as applied by Mr. Lewis to the assize in *Brack. L. Mis.* 447. The fallacy consists in the misapplication of correct principles. The assignment of the nuisance, in this plaint, indicates the real nature of the grievance. It is, diminishing the fall of the water, so that the plaintiff could not do (not as he had done) but as he *otherwise would* have done. In all the plaints cited, and the pleas cited, from *Bro. Abr. Nuis.* 14, 16, 18, 19, the averment is, that the plaintiff could not do as he *had used to do*; thus averring the interruption of an actual existing use, which is essential to a nuisance in the sense of this action. *Baten's Case*, in 9 *Rep.* 54, is an exception *et exceptio probat regulam*. The principle vouched is, *Lex non requirit verificari quod apparet curiæ*; and, on that ground, the court distinguished the case from those cited by the defendant's counsel, otherwise it would have fallen under this rule. In the

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action on the case, you need not prove a specific injury. Show a right, and an invasion of it, and it is enough to recover, even if the defendant show that such invasion was in fact a benefit. *Nor. Peake*, 493, 494. But it is not so in assize;—it must be injurious as well as prejudicial. *Fleta*, lib. 4, cap. 28, sect. 13, sect. 14, pp. 273, 274. This reasoning is not evaded by saying that this writ is *in consimili casu*. The argument is, that there is no such writ among the ancient originals formed by parliament, nor *in consimili casu* formed by the clerks in pursuance of the authority of the statute. The clerks did not form this writ. All the special writs which they formed are in the register. *Steph. on Pl.* 7; but they provided for the case detailed in it by the general form of the action on the case, which is the writ *in consimili casu* that the plaintiff should have adopted. The principle assumed by the plaintiff would allow the conversion of every possible declaration in the action on the case for a nuisance, into an assize of nuisance on the same case. This would be opening a wide field for this action, and the application of its specific redress would be as ample, as the greatest diligence of the ancient clerks in the chancery, or the utmost liberality of the judges could have made it. See 3 *Blacks. Com.* 52.

Exception 4th. The plaint does not allege the seisin, &c., to have been in the plaintiff at and before the erection of the alleged nuisance—it may have ceased before, or have been acquired thereafter.

The averment is, that he was seised on the 1st of *January*, 1806, and that he still is seised. Continuity of seisin is not averred. He then avers, that, being so seised, the defendants on the *day and year aforesaid*, (omitting the word *afterwards*,) levied, &c. It does not appear, from any thing averred, that the plaintiff had any thing more than a momentary seisin on the 1st of *January*, 1806. Such a seisin would satisfy the averment; nor that this momentary seisin was not after the act complained of; nor that the seisin had not passed to some other before the act complained of. Yet, if it was the seisin of any other, and not of the plaintiff, that was violated at the time of the act done, the plaintiff cannot have this action, though the seisin subsequently came to him, *Bro. Nuis.* 16. 16 *Vin.* 41, (X.) pl. 1, and note pl. 3, pa. 29, pl. 20. *Fleta*, lib. 4, cap. 27, sect. 19, p. 270; but *quod permittat*, if any thing would be the remedy. For the requisite degree of precision in averment, see *Leeds v. Shakerly*, *Cro. Eliz.* 751. *Stansby's Case*, *Id.* 754, *Sir Nicholas Point's Case*, *Cro. Jac.* 214. The two last are cases of forcible entry, yet the rule is equally rigorous in assize of nuisance; for anciently it was equally penal in its consequences. See *Fleta*, lib. 4, cap. 28, sect. 1, p. 270. Hence the necessity to inquire after the force. If the recognitors had found force, the defendant might move this objection in arrest of the judgment *cap. pro fine*, and conclude *non constat*, whose seisin was violated, as in the cases cited. See the plaint in *Co. Ent.* 92, where the anx-

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ious precision of the pleader in averring the seisin, was unnecessary, unless this be fatal neglect. The verdict in this case cures nothing. It derives all its certainty from the plaint. Unless title is alleged, the recognitors find none, for they find the fact to be as the plaintiff has declared. The rule on the curative operation of verdicts, is well laid down in 1 *Day's Rep.* 186, 187, *note*. See also 9 *Serg. & Rawle*, 91. *Steph. on Pl.* 166, 167.

Exception 1st. The writ is contrary to the act of the 20th of March, 1724-5, *Purd. Dig.* 28, 1 *Sm. Laws*, 165, which makes it the privilege of freeholders to be sued by summons. The proof that the defendant is within the protection of this act is on the record, and also the decision of the court below, that the use of this writ is consistent with the protection intended to be given by it. The act declares that the writ against freeholders shall be a summons in the form there given. This writ is certainly not a summons, nor in the form prescribed, and the protection of the act, by express terms, extends to matters of form. *Barnard v. Field*, 1 *Dall.* 348, 349. *Hudson v. Howell*, *Id.* 310. It is a writ of arrest. The writ in assize is an attachment. *Com. Dig. B.* 9, 2. An attachment is a writ to take the body, and differs in nothing from a *capias*. *Booth*, 8. *Attach* means to take or apprehend by command or writ. See *Law Dictionary*. The returns to writs in assize prove it. *Co. Ent.* 92. *Brownl. & Golds.* 27, 37. *Aston's Ent.* 123, 124, 126. *Vidian's Ent.* 89. *Brownl. Brev. Judic. (Pone.)* 229, 232. *Com. Dig. Ass. B.* 8. Putting by sureties, or attaching, was anciently the mode used to secure a man's attendance to answer a criminal charge. *Glanv.* 345, 346. And imprisonment was the consequence not of finding *vadios et salvos plegios*. 2 *Inst.* 189. The sheriff was authorized, or rather he was required, to make the defendant find bail for his appearance, or to imprison him. The forms of replevin in 2 *Grayd.* 152, *Plead. Assist.* 381, contain the words *put by sureties and safe pledges*, but in the notes the compilers direct the substitution of the word *summon*, if the defendant be a freeholder. The court below, in their opinion, say "the sheriff has *only served* the writ on the defendant." *Serving* a writ is executing its exigency—doing what it bids to be done, which in this case is putting by sureties and safe pledges. No specific return, but attached by pledges, or by goods, or attached and committed for want of sureties, or *non est inventus*, (see the returns cited, and see another form of return in *Fleta*, lib. 2, cap. 69, sect. 1, p. 153,) would answer the exigency, or be otherwise than merely void. The general return, *served*, is good only because the court will intend it legal until the contrary be shown.

The court also say, that the original in assize is a mandatory letter in the alternative, commanding the defendant to do justice, or appear in court, and they cite 3 *Bl. Com.* 273. This is not true, and the commentator is treating of the *præcipe quod reddat*. Cer-

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tainly the writ in this case is peremptory—it contains no alternative. The writ itself disproves the assertion of the court, unless they mean to deny that the writ in this case is not an original, but process, which cannot be pretended. *Co. Ent.* 92, (a.)

Third Exception. The court should have sustained the challenge to the array. The recognitors were not selected, drawn, summoned, and returned, according to the acts of *March* 29th, 1805, *Feb.* 24th, 1806, *Purd. Dig.* 437, 441. 4 *Smith*, 237, 274. The writ itself directs to a different course, and is therefore erroneous on its face. These acts prescribe the only mode known to our laws of bringing a jury before the court to inquire of matters of fact.

The question is, are recognitors jurors within the meaning of the act? Every evil intended to be remedied by those acts exists in regard to recognitors, as well as jurors. The sheriff, by this practice, is relieved from the check of the wheel, the commissioners and the statutory oath. He acts also without the sanction of the common law oath, provided for the case. See the *Register, Cro. Car.* 26. *Imp. Sheriff*, 32. Unless the objection is tenable, this is an instance in which the policy of modern law is evaded, by the revival of an obsolete remedy. If the plaintiff sues in case, the act applies, and the defendant is protected; if in assize, he is at the mercy of the sheriff, and so by the election of the party his rights are varied. No party ought to be permitted to do this. The act should be applied.

8th Exception. The judgment *Quod capiatur assisa* was not entered. This is always observed when the assize is taken. *Co. Ent.* 92, b. 62, a. 61, a. *Lib. Intrat.* 120, b. It is evidently the language of the court, and conclusions of pleas in bar of the assize, prove it a judgment. “Wherefore he prays judgment if the assize, &c. ought to be taken.” *Co. Ent.* 61, a. and judgment against the pleas is “*quod capiatur inter eos inde assisa.*” The replication concludes, “Wherefore he prays judgment, and that it be proceeded to the caption of the assize.” *Co. Ent.* 61, a. In *Lib. Intrat.* 120, we have a demurrer concluding with a prayer of judgment, and “that the Abbot aforesaid from having his assize be precluded.” This form is founded doubtless in good reason, which would be perceived and felt, if the action were to become common. Its object probably is to indicate the opinion of the court whether collateral matters pleaded are triable by the assize or not, or whether in point of law they are a bar to the action. This judgment of award of the assize, after sufficient matter pleaded in bar, would be error; for in such case the assize would cease till issue on the plea be taken, and verdict found against the plea, or judgment against it on demurrer.

J. M. Porter, for the defendant in error, contended,—That assize of nuisance is an existing remedy. The act of the 22d of *May*, 1722, sect. 21, (1 *Sm. Laws*, 142,) constituting the Court

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of Common Pleas, directs that the justices, or any three of them, "shall hold pleas of assizes," &c. The 22d section empowers every of the justices "to grant replevins, writs of partition, writs of view, and *all other* writs and processes upon the said pleas and actions cognisable in the said respective courts, as occasion may require." In *Wright v. Crane*, 13 *Serg. & Rawle*, 452, this act is declared not to be obsolete.

In 3 *Binn.* 599, is the report of the judges of the Supreme Court as to the *British* statutes in force in this state, in which are nineteen statutes relative to disseisin, writs of entry, and assize, are all declared to be in force; and the judges recommend *them to be incorporated*. The statutes in force will be found in *Roberts's Digest*, pages 144 to 167, and in the appendix to that work, 434, 435. The first of the statutes reported to be in force, is 20 *H.* 3, c. 3, A. D. 1235.; the last is 32 *H.* 8, c. 33, A. D. 1548.

This report of the judges was made, too, in 1808, after the passage of our acts relative to the selecting and summoning of jurors. It is signed by Judges TILGHMAN, YEATES, BRACKENRIDGE, and SMITH. And, in *Witherow v. Keller*, 11 *Serg. & Rawle*, 273, 277, Judges TILGHMAN and DUNCAN said that this report of the judges settles the law, that the remedies under those statutes exist in this state.

In *Livesay v. Gorgas*, 2 *Binn.* 194, in an assize of nuisance, Judge TILGHMAN expressly decides that assize is an existing remedy. And on reference to the record it appears that in that case a motion was made to quash the writ, in the Court of Common Pleas, which was rejected. This case was subsequently tried at *Nisi Prius*, and judgment entered on the finding in this court. Mr. *Lewis* was concerned for the demandant, and Mr. *Rawle* for the tenant. Subsequently Mr. *Dallas* instituted an assize of nuisance in the case of *Mather v. Sheetz*, in the Court of Common Pleas of *Montgomery* county, which was tried and decided in favour of the demandant before Judge WILSON.

The case of *Wentz v. Kline*, a case of assize of nuisance, was afterwards instituted in the Court of Common Pleas of *Montgomery* county, a verdict and judgment were given for the demandant, which judgment was affirmed in this court on the 5th of *April*, 1824.

In 9 *Serg. & Rawle*, 367, Judge DUNCAN says assize of nuisance is a subsisting remedy. We have thus the declared opinion of no less than five of the judges of the Supreme Court, who are all deceased, and of three presiding judges; to wit, Judges WILSON and Ross, in the cases from *Montgomery* county, and Judge PORTER, in this case, that the remedy exists; and whenever spoken of by any of them, this mode of redress is mentioned in terms of approbation, as being the only *complete* remedy existing.

The manner of proceeding in assizes, from the earliest period of its adoption to the end of the reign of *Philip and Mary*, will be

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found very lucidly and methodically laid down in Mr. *Reeves's* valuable history of the *English* law, who traces the trial by jury or *assisa*, as it was first called, from the rude ages of the conquest, through its various modifications and improvements, down to the time of *Elizabeth*. The writers to whom Mr. *Reeves* principally refers are *Glanville* and *Bracton*: to the latter of whom *Fleta* is but a commentary. *Fleta* was written shortly after 13 *Edw.* 1. The process, in assizes, was a summons; attachment never went but when the party was in contempt. It never was necessary that the tenant in an assize should be a freeholder. It was enough that he claimed to have right to do the thing complained of. In early times the recognitors must know the facts of their own knowledge, and decide solely on that knowledge without witnesses. The first notice we have of any recognition or assize, is in the constitutions of *Clarendon*, A. D. 1164. It was not until many years after the reign of *Edw.* 1, that juries were permitted to judge of presumptions, in other words to decide upon evidence submitted to them. Previous to this time, trial by jury or recognitors was but a trial by witnesses. Indeed the system of trial by jury was not fully adopted, and the rights and power of jurors defined until the time of *Edw.* 6, and of *Mary*.

There was in the early and unimproved ages of the law, say up to the reign of *Henry* 3, much true legal learning on the subject of exceptions to the assize; that is, other matters than the mere seisin and disseisin, and as to the mode of trying them, the differences between *assisa* and *jurata*, what matters were properly triable by assize, and what not. These exceptions or incidental points in *Glanville's* time, and he is supposed to have been Chief Justice to *Henry* 2, were generally decided either by duel or by summoning other recognitors to try such exceptions or incidental facts. It was, however, before the close of the reign of *Henry* 3, adopted as the rule that the incidental points should be tried by the same recognitors, not in *modum assisæ*, but in *modum juratæ*, as it were by consent. On the trial it was finally determined as a disseisin or a trespass, according to the nature of the case. In the latter case the assize was turned into a jury. This was the rule, it would appear, too, as well in *Bracton's* time, as in the reigns of *Henry* 3, and *Edw.* 2.

In the early stages of jurisprudence in *England*, the only contests arising among the people, for the determination of which the intervention of the courts was necessary, were those in relation to real estates and the possession of them: for of so little importance was personal property considered, that it was not until the statute of *Westminster* 2d, that any execution in personal actions was given. This statute gave the writ of *fieri facias*.

The remedy by assize was *festinum remedium*, no essoin was allowed, no delay permitted. It was the simple remedy of unsophisticated times to restore a party to his rights, whether deprived

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of them by lawless force, or as a consequence of tortious acts. It lay in all cases of disseisin and re-disseisin. The most common writs of assize were *novel disseisin*, *de morte antecessoris*, *ultima presentationis*, *de nocumento liberi tenementi*, and *de communæ pasturæ*, and these were all the writs of *novel disseisin* mentioned by *Glanville*; and, upon judgment being given for the demandant, a writ of seisin issued to restore the party to his rights.

In the reign of *Henry 3*, the meaning of the term disseisin became enlarged: every wrongful withholding from a man his tene-ments—every obstruction of the free use of his freehold to its full extent—putting sheep, or digging upon a man's land, under claim of an easement, (for if done without claim of right it was a mere trespass,)—the improper use of an easement to which one had a right—distraining for service not due, or where due exceeding the bounds of a reasonable distress, were all considered disseisins and the subject of assizes. In short, if one claimed to partake with the right owner, or raised an unjust contention against him, it was a disseisin of the freehold.

Nuisance being an injury to the freehold, was considered in the nature of a disseisin, and like it was redressed by assize, and the proceeding on it was precisely the same, (*mutatis mutandis*,) as in assize of *novel disseisin*. In *Glanville's* time no mention is made of any other writ for the redress of injury by a nuisance than assize; but in the time of *Henry 3*, we find several writs to the sheriff on questions of nuisance, commanding the sheriff to hear and determine the plaint, &c. of *quare proptavit*, *ad noc. lib. ten.* *Quare*, &c. *viam obstruxit*, &c. *Quare divertit cursum aquæ*, &c.

Nuisance was so much in the nature of a disseisin, that sometimes it might be treated either as a nuisance or a disseisin. If a person caused water to overflow, if it rose on the complainant's own freehold, which it most probably would if he had land on both sides, this was thought rather a disseisin than a nuisance. But if part was in one and part in the other, and the water run over both grounds, then for one part he might have an assize of *novel disseisin* of freehold, for the other an assize of nuisance. So that here would be two assizes on account of the same land. Of the two remedies, however, *Bracton* advises the assize of nuisance as the most likely to remove the whole mischief, by removing the cause.

The statute *de consimili casu*, *Westminster*, 2, c. 24, in effect directed the framing of writs for remedy of every wrong; under its provisions, in the 22 *Edw. 3*, the action of trespass on the case was adopted.

We have no cases reported until the time of *Edw. 2*: up to and during the reign of *Edw. 1*, all the pleas were *viva voce*.

The distinction between *assisa* and *jurata* was, in effect, abolished by the statutes passed in the reign of *Edw. 3*, which gave at-

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taint in all pleas of land against jurors as well as recognitors, which destroyed the reason for the difference: and thenceforth the assize was turned into a jury as often as they were put to inquire of any matter besides the mere seisin and disseisin.

The assize could be taken four ways:—1st, In the point of assize;—2d. Out of the point of assize;—3d. For damages;—4th. At large.

1st, The assize *in point* was the general issue, *nul tort, nul disseisin*.

2d. The assize *out of the point* was where some special matter was pleaded in bar, showing why the assize should not be taken, as a release or some foreign fact to be tried in another country.

3d. The assize *taken for damages* was where such special matter was found against the tenant, or he confessed the ouster, and the assize was charged only to inquire of the damages.

4th. The assize *taken at large* was when, notwithstanding some deed or special matter pleaded, the title and all the circumstances were sent to be tried by the recognitors. *Taking at large* was the most liberal way of doing justice to the parties. It was breaking through the plea which was designed to stop the assize being taken; and it was throwing the merits of the question, whether it depended upon a fact or a title, fairly before the recognitors.

Mr. Porter referred for these general positions, and this history of the remedy, to 1 *Reeves's History of the English Law*, pp. 23, 46, 56, 57, 85, 86, 87, 113, 114, 117, 121, 127, 146, 180, 181, 189, 190, 246, 262-3, 321, 336, 337, 338, 342, 344. 2 *Reeves*, 183, 187, 202, 267, 268, 271, 279, 342, 343, 357, 446, 448. 3 *Reeves*, 22, 23, 24, 25, 28, 29, 89, 113.

He then proceeded to argue the errors assigned in the order in which Mr. Jones had noticed them.

7th *Error*. That the court should have quashed the writ for want of an answer to the second plea, setting forth an indenture.

The plea sets forth in substance, that the demandant from the 9th of *August*, 1793, to the 28th of *May*, 1808, was seised of the *locus in quo*. That the defendant *Barnet* had erected a dam below *Ihrie's* land, whereby the water of his mill was flooded back on *Ihrie's* land. That *Ihrie* had brought a suit for the recovery of damages, and that, for the purpose of putting an end to all disputes, *Ihrie* agreed to give, and *Barnet* to take a lease for permission to throw back the water, *as it was at that time*. "That *Ihrie* accordingly on the 28th of *May*, 1828, grants *Barnet* the right to swell back the water for one year, and from thence until *Ihrie* shall give *Barnet* three months' notice to remove the backwater. That the dam in the indenture and in the plaint mentioned, are the same and not divers; and that so he levied and raised the wall and dam and obstruction without wrong, and by the license and permission of the said Peter *Ihrie*, as well he might, &c.

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The gist of this plea is, that he did not erect the wall and dam tortiously, but by the license of the plaintiff.

All that is said about the indenture is argumentative and mere inducement, and needed no replication. The plaintiff has replied to all the pleadings that the defendant "did erect, levy, and raise this wall and dam of obstruction, wrongfully, and without the license and permission of the said *Peter Ihrie* the elder, and to the nuisance of the freehold of the said *Peter Ihrie* the elder, in manner, &c.; and of this he likewise puts himself on the assize."

The assize have passed upon this matter: they have found that *Barnet* did wrongfully erect the wall, &c., on the 1st of *January*, 1806, without the license, &c. of the plaintiff, in the very words of our replication, and expressly negating the allegations, in substance of the defendant's plea; so that on the merits, the defendant has had all the advantage of his plea, be it good or bad. And it was well replied to. (*Stoever v. Weir*, 10 *Serg. & Rawle*, 24, 27.) 3 *Reeves*, 433, 434, 435, 460. 1 *Saund.* 23, note 5. The plea was bad either, 1st, as a special plea in bar, or 2d, as a plea in abatement.

1. As a plea in bar: It amounted to *nul tort*, and therefore bad. 3 *Reeves*, 431. 5 *Booth*, 313, 314. 1 *Bac. Ab.* 252. 3 *Vin. Ab. Ass. G. a. pl.* 8. 10 *Serg. & Rawle*, 25. 2 *Serg. & Rawle*, 236, 261. 5 *Serg. & Rawle*, 544. 2. It was a plea in abatement, or, at all events, a dilatory plea. *Booth*, 28. 2 *Saund.* 44, note. As either of those kind of pleas, it should have been verified by affidavit. Rule of court of *Northumberland* county, title pleading, (No. 8, page, 20.)

We had a right to treat it as a nullity. If it was either a nullity or irrelevant, we need not reply to it. *Hess v. Heble*, 6 *Serg. & Rawle*, 59, 62.

But in assize, where the defendant pleads to the writ, and over to the assize, no replication to the pleas to the writ shall be made, nor shall the demandant demur, but the matter of the plea shall first be inquired. *Plowden*, 91. *Booth*, 214, 270. Such was the case here, and the recognitors have inquired, and found the matter pleaded to be untrue.

Exceptions which would abate other writs, will not abate assizes. *Plowden*, 91. *Booth*, 214. Exceptions to the writ are not favoured, *Booth*, 267.

But the refusal to quash was not error, such as can be remedied in this court. 2 *Binn.* 249.

The license was a question of fact for the jury; and, if there had been a license to keep it up after a wrongful erection, it would not have barred the assize. *Bro. Ab. Nuisance*, pl. 35. And it appears in *Livesay v. Gorgas*, (*Brack. L. M.* 449,) that there money was paid for the permission to swell. The nuisance need not be erected with force. 2 *Inst.* 399.

As to the 6th error. The refusal to quash for want of answer

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to the first plea. This was a plea of non-tenure. Non-tenure is a plea in abatement, 3 *Reeves*, 459. *Booth*, 8. It should have been verified. As a plea in abatement, it is defective, as it does not give a better writ. *Stephens*, 435. *Fleta*, 301. Is the plea of general non-tenure good, since the statute of *Gloucester*, which gives damages in assize? And was it ever a good plea in assize of nuisance? *Co. Lit.* 363. If tenant plead not tenure, the demandant may aver his writ, and go on for damages. But, as said in answer to the 7th error assigned, the refusal to quash is not error. No replication was necessary. The defendant went on to trial, and the recognitors passed on the matter of the plea, and found it against him. He made no objection to the jury being sworn for want of the cause being at issue.

10th *Error*. The insufficiency of the verdict to support the judgment.

1. As to the recognitors not inquiring of the force. The writ of assize sets forth no force. But it is no error if force is not found. 2 *Inst.* 236, note 5. It was not necessary that they should find that the injury was committed with force, or without it. 2 *Inst.* 399. 2 *Bulst.* 160, 161. In *Wentz v. Kline*, affirmed in this court, the jury say nothing about the force in their verdict. There is no difference in the consequences resulting from a verdict in assize, whether the injury was done with force or not, at this day. The distinction between "*capiatur pro fine* and *in misericordia*, &c. is at this day mere form, a distinction without a difference.

2d *Specification*—That the matter of the first plea should have been found at large, divested of all questions of law, as to what was a freehold and what not. The finding is as specific, and as much at large, as the plea. The recognitors have negatived the plea in its own words. All the pleas out of the points of assize, go before the recognitors, 3 *Reeves*, 23; and their finding, as to the matter alleged against it, in its own words, is sufficient. The question of freehold might be a mixed question of fact and of law, on which it was the province of the recognitors under the direction of the court as to the law, to pass. If the court misdirected as to the law, the party could except to the opinion.

The 3d *Specification* of this error—That the matter of the 2d plea should have been specially found, is answered already. None of these pleas ought to have been treated as pleas. They were not verified, and were defective, and the matter of them could be properly tried under *nul tort nul disseisin*. If they were not pleas in abatement, they were pleas out of the points of assize, upon which the recognitors had a right to pass, and give a general verdict. 3 *Reeves*, 23, 27, 28.

9th *Error*—That the recognitors were not properly sworn. They were sworn as the recognitors were in *Livesay v. Gorgas*. The form of that oath was adopted by Mr. *Lewis*, whose character for accuracy, and correct practice, needs no commendation to give

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it weight in this country. His opponent, Mr. *Rawle*, another veteran at the bar, would have availed himself of the error, if one it was, in a case which was fought inch by inch. The case of *Livesay v. Gorgas*, has in all its details, and particularly in this, been followed in practice for 18 years, in a number of cases which have been mentioned. This decision at *Nisi Prius*, thus tacitly sanctioned in this court, by rendering judgment on it, and acquiesced in so long, is surely as good authority as to the proper form of the oath, as any of the old authorities in *England*, when oaths were different from what they are now. The court will intend nothing against the proceeding. 3 *Bulstr.* 80.

The jury laws of this commonwealth do not apply to assize, nor does the oath of jurors prescribed by our act of assembly. The case of *Livesay v. Gorgas* was tried after the oath to jurors in common cases was prescribed by our act of assembly.

As to the objection, that the oath administered does not embrace the matter of damages, neither does the oath of an ordinary juror, or the oath of an arbitrator, who are sworn "justly and equitably to try all matters in variance submitted to them," *Purd. Dig.* 19: not a word is said about making their award; all is embraced in the word *try*. So here the oath to try the matter of assize meant every thing relative to the assize. The attaint lay as well for findings on collateral matters, as on the points of assize.

15th *Error*—That the count was erroneous in counting for damages. As, under the statute of *Gloucester*, damages are recoverable in assize, it is right they should be counted for. They were counted for in *Livesay v. Gorgas*, and, as we claimed to recover damages, that claim should appear on the record. *Wentz v. Kline*, It could, at all events, do no harm, even if it were not necessary.

12th *Error*—That the judgment should not have been entered *nisi*, but at large. The judgment *nisi* is the *Pennsylvania* judgment: it is the judgment which the court entered in *Livesay v. Gorgas*, and the same kind of judgment which has been entered in all subsequent cases. It accords with the loose practice in *Pennsylvania*, where the docket entries are mere *memoranda*. It is to be moulded into form, and is generally recited in form in the execution: it is the judgment of law, whatever that is, on the finding. If the defendant wishes to see the judgment in this case reduced to form, it may be found in the execution which has been issued.

Whatever may be the decisions about the necessity of entering judgment in real actions on motion in open court, they do not apply to this case for two reasons:

1st. Assize of nuisance is not a real, but a mixed action. *Woodeson*, 23. *Roberts's Dig.* Whatever might have been its character originally, when by the statute damages were recoverable in it, it ceased to be a real action, and became a mixed one. And, it is from not attending to this alteration in the law of assize, that

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judges, in incidentally speaking of the remedy, have called it a real action.

2nd. If it were necessary that the judgment should be entered on motion, the court would, in this case, intend from the record, that it was done so. 5 *Serg. & Rawle*, 166. But, in point of fact, this judgment was rendered on motion, and the record returned shows that fact; for in the opinion of the court below in refusing to quash the execution, that fact is explicitly stated to be within the recollection of the court, if it were necessary to be so entered.

4th *Error*.—That the seisin is not alleged, &c. This is not founded in fact: the plaint follows, *mutatis mutandis*, that in *Livesay v. Gorgas*, and the subsequent cases. It alleges, that on the 1st of *January*, 1806, the plaintiff was, and still is seised; *and being so seised*, the defendant, on the day and year aforesaid, unjustly and without judgment, &c. The cause of action is well laid in this manner. In 2 *Bulst.* 119, and 3 *Bulst.* 86, the court have decided, that the laying the seisin and the nuisance as we have done it in this case, is good. The court will intend it as an allegation of continuity of seisin, after verdict, more especially a verdict distinctly finding the fact to be so as in this case.

1st *Error*.—The refusal to quash the writ, under the freeholder's act of 1724–5. That act does not extend to real or mixed actions. The preamble recites, “that the common law permitteth not the body, *in case of debt*, to be detained,” &c. The act extends only to *process*, not to *original writs*. It gives the form of the two kinds of *process* to be used under it; neither of which would answer in an assize of nuisance, which is framed under the *British* statutes, and modified to suit any case under the statute *in consimili casu*. The uniform understanding has been, that the act of 1724–5 extends only to personal actions.

The old form, “put by sureties and pledges,” is preserved in replevin. *Graydon*, 152. *Arch. Forms*, 406. So also in the *capias* in *Withernam*. After the act of 1724–5 was passed, the common law forms and mode of proceeding, were pursued in ejectment (until it was altered by act of assembly,)—in dower—in partition—in waste, and I may add in an assize of nuisance, *Brack. L. M.* 438; in which case a motion to quash the writ was made in the Court of Common Pleas, and overruled.

The original writ in assize never was considered a writ of arrest or attachment. Attachment never went until a failure to appear on the third summons; the summons not being the *process* on the original writ in assize. 1 *Reeves*, 114, 117. The attachment or *capias*, was only awarded by the court, and was issued for the contempt in not obeying the summons at their discretion. 3 *Reeves*, 113.

The record shows, that in executing this assize, the sheriff *summoned* the defendant; a copy of that summons is contained in the

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sheriff's return. There was, therefore, no violation of personal liberty, and it is an attempt to set aside a proceeding on a mere fiction of law. The argument on the other side is a circle; it ends where it begins. If it has any meaning, it denies the existence of the remedy by assize. They say you can only proceed in the ancient manner, pursuing the ancient form; that assize can only be maintained against a freeholder: and, that a freeholder cannot be proceeded against in the ancient form, because, that form is, technically speaking, an attachment, although not executed as one.

But this being the decision of the court below, as to the execution of its own process, they alone are the judges of privileges claimed in their own courts, and their decisions on those matters are not examinable in error. 2 *Yeates*, 16. 4 *Serg. & Rawle*, 150. 8 *Serg. & Rawle*, 528.

If it was, there is no evidence that the defendant was one of those persons protected by the acts of 1724-5. The deeds mentioned in the record were not recorded. The certificates as to judgments and mortgages, are not evidence, not being under oath, and not stating *that there were none*, but that on searching *the indices*, the officers did not find any unsatisfied judgments or mortgages.

2nd *Error*.—The assize of nuisance is to be varied under the *British* statutes in force in this state, according to the circumstances of the case. The statute *in consimili casu*, *Roberts*, 157, and the other statutes referred to, expressly say the remedy shall be extended to cases in which it hath not theretofore lay; that the party shall not go without remedy, but shall have a count to suit his case, and this is a sufficient answer to all the decisions produced about the framing of original writs, their requisites, &c. But if the defendant did not like our writ, he should have demurred to it. Having pleaded to the plaint he cannot now object, after verdict against him, to the writ. The writ, however, does correspond substantially with a variety of those produced.

5th *Error*.—We disagree as to the fact. Our plaint alleges that the plaintiff, on, &c. at, &c. was and still is seised in his demesne as of fee, of and in a certain water mill site and two acres and fifty-nine perches of land, situate, &c., together with a certain watercourse and stream of water, called the *Bushkill* creek, running through and along the said land from the said mill site, &c.; and that the defendant unjustly, &c. did the nuisance thereto complained of. I understand this allegation to mean that the defendant was seised in his demesne as of fee, of and in a tract of two acres and fifty-nine perches of land, through which the watercourse of the *Bushkill* creek passed, affording a mill site on the land. This being precisely the case in which all the books agree, that in case of a nuisance by draining the water in the creek by a person below, an assize will lie, it is unnecessary to answer cases which have no bearing upon this state of facts. It is as much an injury to prevent a man from using a water power, as it is to swell upon his water,

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wheel in use. The swelling on the *land* is a nuisance remediable by assize.

3d Error—This is in fact the only plausible one assigned. The jury acts of 1805 and 1806, apply only to ordinary trials by jury in the Courts of Common Pleas, Oyer and Terminer, Quarter Sessions, Mayor's Court, and Courts of *Nisi Prius*, and Circuit Courts, for the trial of *issues*. They do not extend to cases in which the judges sit as justices of assize, as is manifest from the 11th sect. of the act of 1805, (*Purd. Dig.* 440,) which speaks of "where views are allowed." This cannot apply to assize, because a rule for a view is a preliminary to a view under the act. But in assize the *venire facias* is in the original process. The terms of the acts of 1805 and 1806 do not embrace "pleas of assize," and the common law remedy remains where the act does not expressly or by necessary implication take it away. The cotemporaneous exposition of those acts in the case of *Livesay v. Gorgas*, shows that the legislature did not intend those jury acts to embrace this remedy. Those acts only embrace issues in civil and criminal cases. Assize is not strictly an issue: it is a mere inquiry, a hypothetical writ. *Rob. Dig.* 148.

The terms "all issues," although general, would not embrace issues of law. The terms of the arbitration law are general, that all suits depending may be arbitrated. Yet it has been held that under it, *certioraris*, suits on official bonds, and actions of account render, are not within its provisions.

The practice in *Livesay v. Gorgas* has been followed ever since, for the sheriff to select the jury: there the jury was selected by the sheriff as at common law: and this court has said the same jury who recognised must try. 2 *Binn.* 195. The sheriff selects the jury as at common law in cases of inquests of damages on interlocutory judgments; on inquests of condemnation on writs of *fieri facias*; on writs of partition; on writs of inquiry in dower, and in partitions in the Orphans' Court. So, too, in landlord and tenants' juries, and in cases of summary proceedings to obtain possession of property bought at a sheriff's sale, and in cases of inquiries of forcible entry, and of lunacy, and under the act relative to habitual drunkards.

But it does not appear by the record that the facts on which the challenge to the array were alleged to be predicated were proved. They are not stated to be admitted, or not denied. *Lil. Ent.* 472. This court, therefore, cannot know from the record in what manner the recognitors were selected, and will presume that they were selected according to the law, as the contrary does not appear. If they were even proved to have been improperly selected, the challenge was not made at the proper time. The challenge to the array is to be made when the jury are called over to be sworn, and before they are sworn. *Arch. Pr.* 181, 185. *Arch. Forms*, 120. *Lil. Ent.* 345, 472. Here the challenge was made before plea put

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in. There was no objection to the jury being sworn at the time they were sworn. And a challenge to the array shall not be until issue is joined. *Booth*, 282, 283.

8th *Error*.—The matter alleged as error is contradicted by the record. The judgment *quod capiatur assisa* was given. The record says, “The plaintiff, by his counsel, prays that the recognitors may be called and sworn to try the matter of assize, which was granted by the court; and thereupon the recognitors of assize, being severally called,” &c.

Tilghman, for the defendant in error.

Binney in reply.

The opinion of the court was delivered by

GIBSON, C. J.—Notwithstanding the recognition of the assize of nuisance as an existing remedy in *Livesay v. Gorgas*, (2 *Binn.* 192,) it has incidentally been suggested that it is still not too late to discard it. I certainly have not been in favour of reviving obsolete forms, which, from the disuse of them by our forefathers, might well be considered as having been rejected at the settlement of the province. It is, however, too late to make a stand against them now, it having been established, by repeated decisions of this court, that all common law actions which have not been abolished by the legislature, are in force here precisely as they are in *England*; and, although no one is more sensible of the inconvenience of this, of which the case before us is a pregnant instance, yet I would be the last to shake what has been as firmly established as a train of decisions by the court in the last resort can establish any thing. If the principle is not to be considered as settled by *Livesay v. Gorgas*, *Lisle v. Richards*, (9 *Serg. & Rawle*, 323,) and *Witherow v. Keller*, (11 *Serg. & Rawle*, 271,) we have no certainty for any thing that is not backed by an act of the legislature. This being so, we have nothing left for it but to adapt the action to modern use, by purging it of its subtleties in mere matters of form, without presuming, however, to meddle with essentials. The ground on which it has been recognised is, that it was all along a living remedy, although dormant; and, like the man who awaking from a trance of twenty years in the *Catskill* mountains, was so altered that on returning to his native village his former acquaintances did not know him, the assize of nuisance is to be received with the same modifications in practice which time has impressed on the forms of our other actions. It would be a sad and sickening task to take it up now just as it was two hundred years ago, when the *English* courts laid it down, without extending to it the benefits of modern practice, or of the statutes of jeofails; or even our own act of assembly for the amendment of slips in pleading. And this leads to the first of the few errors which I shall notice in detail.

It is alleged that the recognitors ought to have been summoned

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and sworn, according to the "Act directing the mode of selecting and returning jurors."

If there is any distinctive peculiarity in this action, it is in the mode of trial. The act of assembly is inapplicable to it, because the recognitors are not jurors; nor are their duties analagous to those of jurors. In the course of the proceedings, issues may be joined on points collateral to the issue, and these they are incompetent to try, unless where they are sworn as a jury *pro hac vice*, or the issue is ordered to be taken at large; in the absence of which a jury, properly so called, must be empaneled. They are not summoned for a single term, but attend the cause from its inception to its termination; and this they must necessarily do, as they are to have the view before the return of the writ. They are in fact an inquest, the proceeding being *festinum remedium*, and their finding not a verdict, but an inquisition: so that as well might the compurgators of a defendant who wages his law in debt on simple contract, (which has been done in *Pennsylvania*,) or a jury impanelled pursuant to a writ, to make partition, be selected according to the act, and sworn as it directs, to try the issue, although there be no issue to try. To swear the recognitors who may find on their own view, to find according to the evidence, would introduce a fundamental alteration in the nature of their duties, unless it were understood that they should swear to one thing and do another; and can any one think the legislature had such an alteration in view. They were not legislating on the subject of the assize of nuisance; for, the truth is, no one suspected that there was any such thing in existence; and to apply the provisions of the act to it, would, it seems to me, carry the construction beyond the spirit and the letter, and introduce confusion and substantial inconvenience into the proceedings. Beside, we have cotemporaneous exposition sanctioned by this court in *Livesay v. Gorgas*; which, as it has produced no particular mischief, ought itself to be decisive.

In this action the proceedings are the same as in an assize of *Novel Disseisin*; and a variety of exceptions have been taken in the case at bar, which doubtless would have prevailed in the time when *Fleta* was written. It is urged, that the court should have quashed the writ for want of an answer to the first and second special pleas. As the pleadings were clearly defective in this respect, there certainly was a time when courts would have done so. But so early as the reign of *Edward* the Third, it came to be the practice in cases like the present and some others, to put the whole case before the recognitors without regard to the pleadings. "The taking of an assize *at large*," says Mr. *Reeve* in his history of the *English law* (*Vol. 3, p. 23*,) "was considered as the most liberal mode of doing justice between the parties; it was breaking through the plea which was designed to stop the assize being taken, and it was throwing the merits of the question, whether it depended on

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a fact or a title, fairly before the recognitors." And again: "An assize would be taken at large ON A DEFECT IN THE PLEADINGS; for as the direct point in the proceeding ought to go to the assize, if what was pleaded in order to prevent the assize, by throwing the question upon another fact, failed to do so, the result was that the assize should pass. Thus it was laid down as a rule, that where a bar was pleaded, and the plaintiff, in reply, made out his own title *without traversing the bar*, and the tenant omitted to rejoin to the title, the assize should not be taken on the title, but at large." Thus we have, as an instance, the very case under consideration; and, as such proceeding was not irregular in the time of *Edward the Third*, it is in vain to look for more technical strictness now. Here the assize was substantially taken at large, by putting the whole case before the recognitors; and the exception cannot prevail.

But it is urged that judgment *quod capiatur assisa* was not entered. It certainly was not entered in form, although the substance of it was preserved in having the assize actually taken. This judgment is proper after issue has been joined on the point of assize, and after special pleas in bar of taking the assize, (if there are any,) have been disposed of; and it is therefore in the nature of a rule for trial after joinder of issue in a modern action. Until of late, it was the practice to enter such a rule in this state; as it was absolutely necessary at the common law. But would a court of error have reversed for want of it on the ground of there having been a mistrial? To have done so would have brought a scandal on the law; and it would reflect as little credit on the administration of justice, to reverse for the same cause here.

These are the exceptions on which the plaintiff in error has mainly relied, and we think they ought not to prevail. There are others of less note, which we are of opinion are worthy of still less consideration; and on which, being purely technical, it is deemed unnecessary to bestow a particular consideration.

HUSTON, J.—This was an assize of nuisance brought by *Peter Ihrie* against *William Barnet*, in which the plaintiff recovered a verdict and judgment, and on which judgment an execution issued, under which a mill dam was prostrated, within the borough of *Easton*, in *Northampton* county.

The proceeding is novel, the effect striking; and, whatever may be said of summary justice and effectual redress, yet the one and the other may be attained in a manner which will excite inquiry, and, perhaps, occasion some alarm. This country had been settled more than a century, and all the citizens, and all the lawyers, and all the courts had progressed under certain notions of right, and certain remedies for wrongs, which, if not the very best, yet were so far good and effectual, as that the country prospered greatly, and there was, at least, no general complaint for want of redress of injuries, or of insecurity of rights. Our ancestors had removed

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from *England*; *England* had once been in a state of barbarism—had, at one time, not much law except that of force, and not much right except that depending on power. In progressing from this state to its present situation, the change was gradual. The first improvements gave place to further improvement, until it has attained to such certainty and security in all the different departments of rights and remedies, as had not been exceeded in any other country.

When our ancestors emigrated, it had, in this respect, attained nearly to its present state; and much of the remedy, and many of the customs and forms of the thirteenth century, had become obsolete, and their place supplied by others better fitted to the present state, and more consonant to sound principles and civilized manners. As colonists, the law of the mother country, to a certain extent, was brought here. But was it the law as then understood and practised, or what was no longer law there, but what had been rejected, and had become obsolete? Did we bring the existing forms of action, or those which on trial had been disapproved of and changed, those after the *Norman* conquest, or those of the present century.

The original settlers of this country, and their successors for more than a century, had no doubt on this subject. No one thought of going to the times of *Edward* and *Richard* for correct views of the rights or remedies necessary for more enlightened times. Trial by battel and attainments and assize were equally unknown. We must now decide whether they are to remain so, or are to be dug from the rubbish in which they had been forgotten, and introduced to our courts, and forced on our citizens, till again experience sends them back to obscurity. The only difficulty, or, at least, the greatest which meets us is the fact, that in 1809, there was an assize of nuisance tried in this county, and about the same time the judges, as is supposed, reported that several acts of parliament prescribing the forms, &c., of assize, were in force. As to the trial, let those who choose read it, and those who wish for such another, say so.

As to the report of the judges, it is not so explicit as could have been wished. Their notes to several statutes “to be incorporated,” and “this statute, or certain sections of it, are in force,” leaves an uncertainty as to what is really meant in each case. I shall show that the words “to be incorporated” did not mean as they do not purport to mean, that the statute has ever been in use in this country.

I think no one will say, that an appeal of murder or felony was ever in use in *Pennsylvania*, or that it can be, since the present constitution; yet four statutes, (the last in 1300,) are mentioned, and have the note “to be incorporated” added to them; and if incorporated, we may see a trial by battel, for it is as much a part of the law as the appeal.

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The punishment of a juror that is ambitexter and taketh money, and two other statutes, all in the reign of *Edward 3d*, empower the court, in which the cause is tried, (or the justices before whom he did swear) to put him to trial without delay; to put him to plead to the country and take the inquest presently; and if he be attainted, to fine, imprison, &c. Now the trial may be in the Court of Common Pleas, and the constitution requires an indictment, &c.

In *Jourdan v. Jourdan*, 9 *Serg. & Rawle*, Chief Justice TILGHMAN says, "voucher is unknown unless in a common recovery." This is not now an action; yet half a dozen statutes regulating voucher are put in the list, and marked "to be incorporated" in one of which, trial by battel is expressly recognised. I stop here for the present, there is no end to this inquiry, but the end of the book.

"To be incorporated" does not mean that the statute is in force. I have said thus much, not to censure the judges who made that report, for no man respects more than I do some of them, both as men and as judges; but to show that it is, and must be a mistake to say, or suppose they thought, or meant those statutes to be now in force. In their report they say, "In perusing the statutes referred to in the report, the legislature will perceive, that in many of them, the language is uncouth, and unsuited to our present form of government;" and again, "there is no other way of curing these defects than by re-enacting the *substance* of these statutes in language suitable to our present condition, &c.;" and I will add with great deference, that neither rights or remedies are treated in some of them, in a manner at all consistent with the general sentiment, or with the spirit of our own laws and constitution.

Several statutes relating to, and some of them minutely directing the proceedings in assize, are reported: and the present case brings the subject before the court for its consideration. I admit, that of this action, I know little; of that little, I dislike every part. The assize fell into disuse in *England* so long ago, and the cases and the books would seem to show such variety in the courts, and in the proceedings, that I must conclude, that many things relating to it were in a state of change, and very few were settled and certain, when it was abandoned. I shall mention some matters of which there seems to be no doubt.

And first, if the recognitors could not agree, the assize was enforced or forced by adding others, until twelve were either for defendant or tenant. Whether these new jurors heard the evidence I cannot learn.

Next, although the sheriff returned, that defendant was not found in his bailiwick, and had no goods by which he could be attached, yet shall the assize be taken, 3 *Vin.* 197, *F. N. B.* 410; and this is so well settled, that in a statute which I shall cite presently an enactment is made expressly on this ground, and prescribing a remedy. If defendant do appear, he cannot plead that the plaintiff

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has enfeoffed another, who is in full life, or that a feme plaintiff is a married woman. He may plead a release from the plaintiff of all actions personal, which is in bar of damages; but he cannot plead a release of the right, or any plea in extinguishment of the plaintiff's right, 3 *Vin.* 219, 220: it seems he is confined to the plea of *nul disseisin*. If the defendant appears by bailiff, he cannot plead any special plea, except what is *nul tenant*, *nul disseisin*, nor any plea on which a certificate of assize lies.

The assize might be brought before the Court of Common Pleas or King's Bench, if either was in the county where the lands lay. The judges of these courts have authority without a patent, but generally, a patent issued to certain persons named, either to take all assizes in that county, or to take a particular case, and it would seem, these persons were named by the plaintiff. *F. N. B.* 409, *et seq.*; and in all cases, the certificate may be before other justices than those who took the assize, if the party suing it wishes. *F. N. B.* 425.

But the statute 13 *Ed.* 1, c. 25, among other things enacts, that if exception be alleged by a bailiff, the taking the assize shall not be delayed therefor, nor the judgment upon the restitution of lands and damages: but, if the master of such bailiff, that was absent, come after, before the same justices that took the assize, and offer to prove by record or rolls, that at another time an assize passed between the same parties of the same land, or that the plaintiff at another time did withdraw his suit in a like writ, or that a plea hangeth by a writ of more high nature; a writ of *venire facias* shall be granted unto him to cause the same record to be brought, and when he hath the same, and the justices do perceive that the said record shown by him would have been available before the judgment, that the plaintiff by force of the same would have been barred of his action, the justices shall presently cause the party to be warned, that first recovered, that he appear at a certain day, at which the defendant shall have again his seisin and damages, (if he before paid any by the first judgment given,) which shall be restored to him to the double, as is before said. And, also, he that first recovered shall be punished by imprisonment, according to the discretion of the justices. Now remember it is settled, that if the bailiff offered to show all or any of these things to the suit of assize, he will not be permitted; because his master may have this remedy and recover again. The statute then adds, in the same manner, if the defendant, against whom the assize passed in his absence, show any deeds or releases, upon the making whereof the jury were not examined, nor could be examined, because there was no mention made of them in pleading, and by probability might be ignorant of the making of those writings, the justices upon the sight of those writings shall cause the party to be warned that recovered, that he appear at a certain day, and shall cause the jurors of the same assize to come; and if he shall verify those wri-

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things to be true by the verdict of the jury or by enrolment, he that purchased the assize contrary to his own deed shall be punished by the pain aforesaid. Now, this re-examination was on what was called a certificate of assize, and was before those who took the first assize, or before others—if the party suing it so willed. And a new patent of assize and a certificate issued to the sheriff, (see the forms of those writs, *F. N. B.* 421, *et seq.*) There was, also, another certificate, where the verdict was not well examined by the justices when they took the verdict; or when they have not well examined or fully inquired of the issue joined, &c. Now, this re-examination was as well known, and in as constant use as the assize. It was prescribed by the statute; but it did not in practice depend on the will of those who took the assize. The party injured could obtain the writ and the hearing. What mode shall we adopt to obtain it here, or are we to have it here? Are we to have only half and the worst half of the proceeding, or the whole? And is that whole consistent with our system of government and judiciary?

If it shall be said, that the absurdities and injustice of refusing a defence to-day and receiving it to-morrow, or of trying and deciding the cause of a man never summoned, and pulling down his house, &c., and then giving him a new trial, and fining and imprisoning the plaintiff, would not be adopted here, the answer is—then state what will be adopted and what rejected, and prescribe new forms and new rules. But this will make it not the old assize, but a new kind of action, which I doubt our power to prescribe. As it is, it is, from all I can learn of it, unfit for use: it has not been used, and in my opinion cannot, until enacted by our own legislature.

If it is said it has been decided in *Livesay v. Gorgas* that this remedy is in force; my reply is, it was not so decided. The whole opinion leans the other way; it only decides that if the action lay, it could be removed from the Court of Common Pleas to the Circuit Court: and, to prevent mistakes and leave the matter open, the Chief Justice expressly says that was the only point made, and the only one decided.

But so far as that case goes, it proves that if the remedy exist, it is an action, and not a mere inquest. An inquest never was removed or removable after it was begun, and before finding, from the Court of Common Pleas to the Circuit Court.

If it is an action, there was error in not quashing, because a *capias* and not a summons issued against the defendant, who was proved and admitted to be a freeholder. The act is peremptory; we have no power to dispense with or repeal it. If it is an action, the exception to the jury was fatal.

By our acts of assembly jurors are to try all actions in court, must be selected, put in the wheel, drawn and summoned in a particular manner. These acts bind all our courts, and apply to all

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cases. It will not do to say this is not an action, but an inquest: it is an action, or it is nothing. Who has heard or read of a writ, a *narr.*, a plea in abatement, in bar, &c., in an inquest of office, or of a plaintiff being nonsuited for not declaring? It is true the old books call these jurors recognitors; but the statute above cited, though not a modern one, calls them the jury. The law which says the assize may be brought and tried in the King's Bench and the Court of Common Pleas, says so. It has all the distinguishing characteristics of an action, and not one of an inquest. There was error in deciding that the plaintiff need not reply to the release pleaded by the defendant. It is true that it may happen that a plea is put in, requiring a replication, and this may be forgotten or overlooked, and the court may, after trial on the merits, refuse to reverse on this ground. But it is not true that any court can compel a party who has pleaded to proceed to trial, and to try the cause until his plea is answered; unless, perhaps, in the case where the plea is palpably fictitious and impertinent. This was not so. I do not say positively that it was a bar to the assize, though I incline to think it was in reason and in law, but it was at least a bar to the recovery of damages. Where the defendant pleads in bar, and gives colour to the plaintiff, a replication is necessary; it is necessary in all cases where it does not amount to the general issue: though it need not generally be set out at large. 16 *Vin.* 230, title *Assize*, (*y. a.* and *B.*) *Replication*. That the plea was a good bar to the assize, see 16 *Vin.* *Assize G. a.* and *Pleas in Bar*, 12. "Note *per Littleton* and *Vavasor*, that it was held by all the judges in *England*, that a lease for years, the reversion in the plaintiff, was a good bar in assize," and the rest of that page. And I have not been able to find any decision to the contrary.

There are other parts of this record to which I cannot reconcile my ideas of law or of justice: but I pass them over. I feel that in the opinion now delivered I shall be supposed to differ from men now gone, and for whom I felt more than ordinary respect; but I also suppose that the general opinion, that the statutes included in their report by the judges, were believed by them to have been, and to be now in force, is doing them great injustice. I know that some of them expected an act of assembly to follow that report; and that it was rather the principle of the statute than the statute itself of which they approved and which they wished to be incorporated. We have in point more than one expression of our late Chief Justice, that he did not know why particular statutes, not reported, were omitted: and have heard him state more than once his doubts of the propriety of others being included. And I feel confident, that where either the provisions of one of our acts of assembly, or the spirit and principle of our constitution is infringed by the words or the scope of an old statute, or the forms of an antiquated action, it was not intended or expected they would or could be revived, except by the legislature.

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I also differ from the rest of the court; but I cannot believe that our statutes of limitation, which were supposed to embrace every case, can be evaded by the introduction of antiquated and forgotten forms of action; or that our system of jury trial, so carefully and so repeatedly revised, shall be rendered useless; or that the privilege of freeholders, so long and so constantly protected; our acts of arbitration, and several parts of our constitution, are all to yield to a form of action, of the good effects of which we only know that on trial it was suffered to fall into disuse; of particular parts of which we know that they contradict our general notions of rights and remedies—and of the whole of which I confess myself to be so ignorant, that I dread the labour it must cost me to form any correct opinion.

Judgment affirmed.

[PHILADELPHIA, MARCH 28, 1828.]

COMMONWEALTH, *ex relatione* BACHE, against BINNS.

QUO WARRANTO.

The selection of an editor of a newspaper, to print the laws of the *United States*, by the secretary of state of the *United States*, is not conferring an office, appointment, or employment under the *United States*, incompatible by virtue of the act of assembly of the 12th of *February*, 1802, with the office of alderman of the city of *Philadelphia*.

THIS was a rule to show cause why an information, in nature of a *quo warranto*, should not be filed against the defendant, *John Binns*, to inquire by what authority he exercised the office of an alderman of the city of *Philadelphia*.

It appeared that the defendant was duly commissioned an alderman of the city of *Philadelphia*, on the 2d of *December*, 1822, by Governor *Heister*, and had, since that time, continued to exercise the duties of the office. In the month of *December*, 1825, being then and since editor of the *Democratic Press*, a daily paper, published in this city, he received a letter from *Henry Clay*, secretary of state, dated the 13th of *November*, 1825, in which he stated, that “his newspaper has been selected as one among the number designated for publishing the orders, resolutions, and laws, except such as are of a private nature, and public treaties, with the exception of *Indian* treaties, which may be approved and ratified during the first session of the nineteenth congress.” In *December*, 1826, he received a similar letter, dated the 7th, authorizing him to publish, in the *Democratic Press*, the orders, &c., of the second session of the nineteenth congress. And in *December*, 1827, he received a third letter, dated the 7th, of a similar tenor as to the orders, &c., of the first session of the twentieth congress. These

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letters directed, that in case of a sale or transfer of the newspaper, or of a change of its title, notice of the fact should be communicated to the department of state, in order to obviate any difficulty as to the person entitled to the compensation: and the conclusion of the last two letters was as follows: "If you should omit to give this department the notice thus required, the amount due will be paid to the person first applying for it, as the person best entitled to the same."

It was now contended, that the defendant's printing, in the *Democratic Press*, the laws, orders, &c., of congress, under this arrangement with the secretary of state, was an appointment or employment incompatible with the office of alderman, under the constitution of *Pennsylvania*, Art. 2, sect. 8, and the incompatible act passed, by the legislature of *Pennsylvania*, on the 12th of February, 1802.

The case was argued by *Kittera* and *Rawle*, (with whom was *Swift*,) in support of the rule, and *Pettit* and *J. R. Ingersoll*, contra.

TON, J.—It seems to me that this case, if it can come at all within the act of assembly, must come within it because an engagement, under the act of congress, by a printer, to publish the laws of the *United States*, is an office, or an appointment in the nature of an office: or, if the printer is not to be ranked as an officer of the *United States*, yet, that he is included in the description of subordinate officer or agent, or person employed; or, lastly, though not falling within the precise words, yet that his case may be fairly construed to come within the spirit and intent of the law. My opinion is, that the case does not come within the words of the act of assembly, nor within the meaning of it; that *John Binns* holds merely a contract under the federal government, an extensive job of work, as printer of a newspaper, implying such trust only as is ordinarily implied in contracts for work; and that it is neither an office, nor appointment or employment in the nature of an office, incompatible with the office of alderman, under the act of assembly of 1802. The title of that act deserves attention. "An act declaring the holding of offices or appointments under this state, incompatible with holding or exercising offices or appointments under the *United States*." The preamble also serves to show that offices under the federal government, not contracts, were intended. "Whereas the eighth section of the second article of the constitution of this commonwealth provides, that no person holding or exercising any office of profit or trust under the *United States*, shall, at the same time, hold or exercise any office in this state which the legislature thereof shall declare incompatible with offices or appointments under the *United States*."

The first section provides, "that every person who shall hold any office, or appointment of profit or trust, under the government of

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the *United States*, whether a commissioned officer or otherwise, a subordinate officer or agent, who is or shall be employed under the legislative, executive, or judiciary departments of the *United States*; and also every member of congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, mayor, recorder, burgess, or alderman, of any city, corporate town, or borough, resident physician at the *Lazaretto*, constable, judge, inspector, or clerk of election, under this commonwealth."

It would appear, that in order to bring this case of the printer of a newspaper, working for the *United States* government, as he would work for any other customer on contract for pay, within the terms of this section, we must do what, I take it, cannot well be done: we must, in effect, transpose the words, and also remove them from the place where they now stand, before the members of congress, and bring them in before agent, &c., so as to read—"and also every subordinate officer or agent, who is, or shall be employed under the legislative, executive, or judiciary departments of the *United States*." The words "office," "appointment," "trust," and "profit," pervade and qualify the whole previous part of the section. Nor can we, in my opinion, separate those qualifying terms from the words of agency and employment, without violence to the language; and the word "who," when it occurs the second time, seems plainly to refer to the previous description, and to every part of it. Thus, I understand the prohibition to be against all offices, and subordinate offices, of trust or profit, under the federal government, and against all appointments, agencies, and employments, in the nature of offices of trust or profit, under the same government, and against nothing else. True, here are perhaps, more words used by the law makers, than may appear to be necessary to convey this meaning. But redundant expressions will be often found in acts of assembly, and acts of congress; like *rest*, *residue*, and *remainder* in a deed, or in a will. It was known, that by the laws and usages of the federal government, appointments, in the nature of office, were sometimes granted without the name of office, without a commission, and without the vote of the senate. All these were evidently intended to be declared incompatible; but without meddling, or intending to meddle, with contracts, or with any agency or employment in the nature of contract, I am brought to this conclusion not only by the plain words of the section, and by the preamble of the law, in strict conformity with the title, but from the firmest persuasion, that if the legislature had meant to disable every agent whatsoever, and every person employed by the federal government, including not only every contractor of every description, but every workman and day labourer, they would have said so in intelligible language. Besides, it is next to incredible that any law could intend, in prohibiting offices under the *United States* government, to prohibit those only of trust or profit, but in

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prohibiting those inferior matters of agencies and employments, to forbid them generally and totally, by leaving out all qualification of trust or profit. But the remaining sections of the act of assembly appear, of themselves, conclusive to show, that the makers of it could have had no imagination of taking in a case like the present. Section 2d. "The holding of any of the aforesaid offices or appointments under this state, is hereby declared to be incompatible with any office or appointment under the *United States*; and every such commission, office, or appointment so holden under the government of this state, contrary to the true intent and meaning of this act, shall be, and the same is hereby declared to be, null and void." The third section is still more explicit. Section 3d. "If any person, after the expiration of six months from the passage of this act, shall exercise any offices or appointments, the exercise of which is, by this act, declared to be incompatible, every person so offending, shall, for every such offence, being thereof legally convicted in any court of record, forfeit and pay any sum not less than fifty, nor more than five hundred dollars, at the discretion of the court, &c." In these two sections there is no mention made of "subordinate officer," or agent, or agency, or person employed, nor any words equivalent. Yet the third section, which contains the penalty, and the second section, declaring the incompatibility, go on to repeal the substance of the description of the offence, and, in doing so, the words omitted must, I think, have been left out totally, as they are, because they were supposed to be unessential. For it seems clear, that if the mere holding of an employment, contract, or agency, unconnected with office, was meant to be prohibited in the first section, a punishment for that offence also, as well as for the offence of exercising an office or appointment, would have been enacted. If it is not so, then this act of assembly is probably the only one to be found in our statute book, in which the penalty inserted is not co-extensive with the prohibition. Besides, in many cases there would be no penalty at all. A clerk of an election, for instance, who should sell goods, or make any other contract with an officer of the federal government, or suffer himself to be employed under that government at work upon a road or canal, or in building a fort or a ship, could not be made to forfeit his office as clerk on conviction in a court of law, because the office has expired already, perhaps in half a day, perhaps in half an hour after its creation. And he clearly would not be liable to the pecuniary penalty in the third section, agency or employment under the *United States*, not being named or referred to in that section.

That the words which have been so strongly relied on by the counsel—"subordinate officer or agent, who is, or shall be, employed under the legislative, executive, or judiciary departments of the *United States*," cannot have the meaning contended for, will, I think, be further evident, not only from the clauses of the constitution relative to the incompatibility of offices, but from the terms of

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the supplement to this very act of assembly of 1802. By the constitution, "no member of congress, or person holding any office under the *United States*, or this state, shall exercise the office of governor." *Art. 2, sect. 5.*

"No member of congress, or other person holding any office (except of attorney at law, and in the militia) under the *United States*, or this commonwealth, shall be a member of either house during his continuance in congress, or in office." *Article 1. section 18.*

"No member of congress from this state, nor any person holding or exercising any office of trust or profit under the *United States*, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state to which a salary is by law annexed, or any other office which future legislatures shall declare incompatible with offices or appointments under the *United States*." *Art. sect. 8.*

Such being the terms of the constitution on which the act of assembly of 1802 is expressly founded, containing only the words *office* and *appointment under the United States*, without mention of *agencies*, or *employments*, or any thing of the kind, the whole subject came before the legislature in 1812, in framing a supplement to this identical act of assembly of 1802. Its title is, "A supplement to the act declaring the holding of *office or appointment* under this state, incompatible with the holding or exercising of *offices or appointments* under the *United States*." The words are, "Be it enacted, &c., that no member of congress, from this state, nor any person holding or exercising any office or appointment of trust or profit under the executive, legislative, or judiciary departments of the government of the *United States*, shall, at the same time, hold, exercise or enjoy, the office of clerk of the Court of Quarter Sessions, clerk of the Orphans' Court, or deputy surveyor under this commonwealth." Here the persons forbidden to hold the offices of clerk of the Quarter Sessions, clerk of the Orphans' Court, or deputy surveyor, are the persons *holding or exercising any office or appointment of trust or profit under the executive, legislative, or judiciary department of the governments of the United States*. Nothing is said of *subordinate officers*, or of *agents* or of *persons employed*; and thus leaving out of the supplement those parts of the original act which have been relied on, by the counsel, to include the present case. Now, one of two consequences appears inevitable. Either the legislature of 1812, when they had the act of 1802 before them, and were forming a supplement to it, considered the words *subordinate officer, or agent, who is or shall be employed under the legislative, executive, or judiciary departments of the United States*, as mere surplusage, adding nothing to the force and effect of the law, or they intended the gross partiality and absurdity of permitting clerks of the Quar-

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ter Sessions, clerks of the Orphans' Court, and deputy surveyors, officers whose whole time, unless where they keep deputies, is required to attend to the duties of their office, and whose stations are always of great trust, and often of great profit, permitting them to act as agents under the *United States*, to hold contracts, and to be employed by the *United States*; and, at the same time, to prohibit, under a penalty of five hundred dollars, any of these agencies, contracts, or employments, to be held by an alderman, of whom there are some dozen or fifteen in one place, or a constable, whose office lasts but for a year, or by a judge of election, whose office lasts no longer than a day, or by a burgess, holding a post of mere trouble, with scarcely any power and no pay. Indeed, if the words of the act of 1802 were doubtful, it would be with extreme reluctance that I should consent to introduce, by construction and argument, such confusion into what ought to be and is a rational system, to introduce a rule against every notion of equality and common sense, reversing the whole policy of the state, as far as respects the incompatibility of offices, a rule which would seem to guard public men from the approaches of influence and corruption, with a watchfulness not according to the magnitude of the trust and of the danger, but with a jealousy and rigour just in proportion to the insignificance of the office; so as to permit agencies, employments, and contracts to a sheriff, while we refuse them to a constable, give to a member of assembly, or to a judge, a liberty of traffic which we refuse to a justice of the peace, and let a clerk of the Quarter Sessions, a clerk of the Orphans' Court, a county surveyor, or even the governor himself, engage in business which we hold to be incompatible with the official duties of a clerk of a township election.

There is another matter which, in my opinion, renders the construction argued for not only incredible, but impossible. This law was made in 1802. Our legislature, at all times faithful and loyal to the Union, was, I believe, never more heartily so than in Mr. *Jefferson's* day. It will require express words to convince me that an act passed *then* was intended to prohibit all justices of the peace and constables, all mayors, recorders, burgesses, and aldermen, and all judges, inspectors, and clerks of election, not only from holding any office or appointment of profit or trust, under the federal government, but from doing any act whatsoever, and from being employed in any possible business whatsoever under that government. If such shall be decided to be the meaning of the law, every one sees that it may go very far to proscribe some very essential operations of the national government in *Pennsylvania*. Every justice of the peace, or alderman, who is employed, on behalf of the *United States*, to issue a warrant for felony committed on the seas, robberies or thefts upon the mail, or any other crime against the *United States*, will come directly in the capacity of agent, or as a person employed, under the penalty of the act. Every constable who ventures to execute such warrant will incur the same forfeiture. Eve-

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ry juror who serves in the *United States* courts is employed under the judiciary department. Every militia man who is called into the public service is directly employed under the executive. Was it ever heard of that a justice, constable, burgess, or alderman, was exempted from the muster roll, because service under the *United States* was incompatible with his state office? Every contractor for roads or canals, every labourer upon them, every builder of ships or light-houses, may be said to be an agent, or, if not an agent, he is a person employed. There would be no end to the vexations that might be pointed out. To take one case out of thousands, that of printers of newspapers, and therefore most applicable to the present, who are every day called upon to give information to the public relative to the army, or the navy, or to contracts, public lands, or the post office,—such, for instance, as the publication required by law, of a list of letters remaining in the post office, in some newspaper of the place, how many places in the country are there where the printers are liable to suits for penalties, and to motions of *quo warranto* under the construction now attempted of the act of 1802? I happen to live in a post town where there are but two newspapers printed, and each editor is a justice of the peace.

But what seems the most inadmissible part of the doctrine is yet to be mentioned. By separating the words in the law of *office or appointment of trust or profit*, from the words relative to *agency or employment*, we should make it wholly immaterial whether there is any profit or trust in the case or not, so that, without any contract at all, one of the state officers, named in the law, by volunteering his services under any department of the federal government, or if he should happen to be detected in time of war, in the ranks, or at work upon some fortification, under the federal government, though without any pay, yet being clearly *employed*, he would as clearly come under this construction of the act. This is no caricature of the doctrine advanced by the counsel. One of the gentlemen has contended expressly, that Mr. *Binns*, over and above the job of printing the laws, has forfeited his office, and from fifty to five hundred dollars of additional penalty, by the contract for furnishing stationary to the collector's office, under instructions from the secretary of the treasury. I mention this to show the counsel's interpretation of the words *agent* and *person employed*. And he is right in this, if he is right in his construction of the act. But it strikes me to be a doctrine which, as to its consequences, defies all aggravation. It will, no doubt, be admitted, that the extent of the dealing can legally make no difference under this act of assembly; and it must be admitted, upon the principle of the equal obligation of the laws, that if Mr. *Binns* is liable to the penalty of the act, on this contract of sale, then any other alderman, or any justice of the peace, or burgess, constable, inspector, or clerk of election, must be liable to the same penalty for selling a basket of

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bread, or pound of candles, to the master of a revenue cutter. As this whole doctrine throughout would imply unequivocal hostility to the Union, and as to enforce it upon all occasions, would, perhaps, be more effectual to put down the operations of the federal government in *Pennsylvania*, than the resolutions of non-intercourse were against the *British* government at the revolution, it seems to me impossible that the legislature of 1802 could have imagined any such interpretation.

A word used in Mr. *Clay's* letter has been relied on by the counsel. He twice mentions *appointment*. I take it, if there is nothing in the constitution, nor in the law, nor in the facts of the case which brings Mr. *Binns* within the penalty, it will certainly be rather hard to bring him in by virtue of a word casually employed by the secretary. If I recollect the paper rightly, Mr. *Clay* first uses the word *designated*. But if he had used the term *appointment* throughout, it would have been, in my opinion, but a small matter. *Appointment* is often synonymous with *office*; but it is by no means always so. Numerous instances may occur to every one. Visitors of the *West Point* Military Academy are *appointed* by the secretary of war, yet, perhaps, it was never once imagined that such appointment was an office under the government, and therefore incompatible with the station of member of congress, or member of assembly. State officers are frequently appointed to do many things for the *United States*. The judges of the state courts are appointed to take the evidence of the service of old soldiers to be pensioned. Sheriffs, jailors, and public prisons, are appointed and employed to perform the same duties to the federal government, in the safe keeping of criminals, which they owe to the state government. In Mr. *Biddle's* case, decided by the senate of the commonwealth, the word *appointed* was expressly used in the act of congress itself.

This case, therefore, I take to be one out of the letter of the act of 1802. Further, I do not believe it comes within the spirit or intent of the law, and have given my reasons. But suppose in this I am mistaken; that, by a liberal construction, the case may be brought within the act (and I am not inclined to have the greatest faith in my own judgment, when opposed by that of so respectable a portion of this court;) yet still, it appears to me, the result must be the very same; and we must refuse the *quo warranto*, if we are to regard previous decisions. This identical case may not have been decided; but the principle is settled, if any thing of the kind can be said to be settled. The question of incompatibility is no new question. The established rule is to give the strictest possible construction to every part of the constitution, and to every act of assembly, declaring state offices incompatible with offices or appointments under the federal government, or declaring different state offices incompatible with each other, and never to hold any thing to be within the prohibition unless expressed and named; and to

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take in no possible case by construction. This principle has been established by every authority known in the land: by the people in their elections, by the legislature in their appointments, by each separate branch of the legislature in their solemn decisions, by the governor in his appointments, and by the courts of law in their judgments. The reasons why the rule has become so deeply fixed, as never to be varied from in any single case, are not, I think, for us to examine. If they were, I should be inclined to dissent from one of the counsel of Mr. *Binns*, who has adduced the maxim which requires a strict construction of all penal laws. There appears something in that too technical for the production of such universal effect. I would rather believe the effect to be produced by the apparent harshness of taking, unless where some plain and unequivocal precept requires it, from the people, or from the agents of the people, their power of intrusting the public business to those men whom they may think most fit to be trusted, especially when it is the case, and probably always has been the case in *Pennsylvania*, that, of all the offices in the commonwealth, there is not one in twenty, perhaps not one in fifty, the emoluments of which will enable a man to support a family without something else to do. To begin with the constitution of 1776, which contained a clause of incompatibility similar to that of the present, as to all the purposes of this argument. The legislature chose Dr. *Franklin* as a delegate to congress while he was envoy to *France*. This election was censured, by the council of censors, as unconstitutional. The reasons of the legislature I have not seen. Therefore I give the matter as a fact of old times, not as a precedent. But, under the present constitution, I mention the decisions as precedents. The clause already cited declares that "no member of congress, or other person holding any office (except of attorney at law, and in the militia) under the *United States, or this commonwealth*, shall be a member of either house during his continuance in congress, or in office."

Now, let us take first that most familiar case of deputy surveyors, and of deputy attorneys general. They are officers, in a certain sense, most clearly. They are not appointed by the governor, but they are appointed by him who is appointed by the governor. They receive fees of office. The act of assembly (2 *Sm. Laws*, 31,) creating the post of deputy surveyor, names it an office in nearly half a dozen places. It imposes an oath to do and perform the duties of the office with fidelity and impartiality to all men; and the oath is to be signed by the officer taking the same. The very supplement to the incompatible law, under which we are now deciding, names the office of deputy surveyor. They are important offices, they are necessarily local, and the duties of them must be frequently, if not constantly, in requisition. I am persuaded no man will deny that these offices come within the reason of the prohibition. But they do not come within the letter of it, according to the invariable construction put upon the words by the whole commonwealth. From

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the very first the people have frequently sent to the legislature those officers to represent them; and the same men, though contriving to hold the same offices, have been frequently re-elected. To mention a few instances may be sufficient. The present Chief Justice of this court was sent a representative from *Cumberland* county, though deputy attorney general at the same time. Mr. *Farrelly*, while deputy attorney general of *Crawford* county, was also a member of the house. So Mr. *McArthur*, a deputy surveyor of the same county, was member of the senate in 1804, 1805, 1806. General *Piper*, while deputy surveyor of *Bedford* county, was a member of the house in 1805, 1806, 1807. Mr. *Dale*, deputy surveyor of *Venango* county, from 1809 to 1813. Colonel *Orr*, deputy surveyor of *Armstrong* county, in 1818, 1819. Mr. *Hyneman*, of *Berks* county, and many others.

This matter has not been decided by the people only. It has been repeatedly brought before the legislature. In the house of representatives, sessions 1816, 1817 (*Journal*, page 355,) a resolution was moved by Dr. *Leib*, "that the surveyor general, and attorney general, be directed to furnish, to this house, the names and places of residence of the deputies under their appointment." The object of this resolution was known and declared, and (page 363) was considered by the house, and rejected: yeas, 34; nays, 49. Again, in the senate, sessions, 1820, 1821, (*Journal*, page 75,) a motion was made, by Dr. *Leib*, as follows: "Whereas the constitution of this commonwealth provides that no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this commonwealth, which shall have been created, or the emoluments of which shall have been increased during such time: and no member of congress, or other person holding any office (except of attorney at law, or in the militia) under the *United States*, or this commonwealth, shall be a member of either house during his continuance in congress, or in office. And whereas *Philip S. Markley* and *Isaac D. Barnard* are deputy attorneys general, and holding offices under this commonwealth, are not entitled to be members of the senate. Therefore resolved, that *Philip S. Markley* and *Isaac D. Barnard* are not entitled to be members of the senate, and their seats are hereby declared to be vacated." Ordered to lie on the table. Friday, *December 22d*, 1820. (Page 135.) The resolution read on the 13th instant, relative to vacating the seats of Mr. *Markley* and Mr. *Barnard*, was again read, and the same having been considered on the question—will the senate adopt the same?—the decision was in the negative. Yeas, 2; nays, 25. That most conclusive decision of the senate, in the case of Mr. *Biddle*, has been mentioned already.

I hold that we are bound by these decisions, not only from the weight of character of legislators and immediate representatives of the people, but because their decisions are final without appeal; the

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constitution having made them the exclusive judges of the qualifications of their own members. For us to set up a rule different from the one adopted every where else, may have the effect of producing not confusion only, but absolute injustice, if it is injustice to adopt an interpretation against one officer, from which every other officer, from the beginning of the government, has been exempted. Let us attend, for one moment, to the construction put upon the supplement to this very law of incompatibility under which we are now acting. The third section provides (5 *Sm. Laws*, 309,) "that no member of either branch of the legislature of this commonwealth, shall, during the time for which he shall have been elected, hold any other office or appointment within this commonwealth to which perquisites or fees are attached, under the constitution or any law, except in the militia, attorney at law, or elective offices and appointments by the people, and by the courts of justice." There was some doubt at first, but the strictest construction of this section has been established without any dispute or the appearance of it. General *Ogle* was appointed prothonotary of *Somerset* county by Governor *Snyder*; Judge *WILKINS* was commissioned by Governor *Findlay*; Judge *LIGHTNER*, of *Lancaster* county, by Governor *Hiester*; Judge *SHIPPEN* by Governor *Shulze*. All these gentlemen were appointed during the time for which they were elected to the legislature.

But there is a train of authorities still more conclusive, in my opinion, if it is possible for any thing to be more conclusive. The constitution has been already cited, declaring that "no member of congress, or other person holding any office (except of attorney at law, and in the militia,) under the *United States*, or this commonwealth, shall be a member of either house during his continuance in congress, or in office." And again, "no member of congress from this state, nor any person holding or exercising any office of trust or profit under the *United States*, shall, at the same time, hold or exercise the office of judge, secretary, &c." Yet Mr. *Samuel Maclay* was elected senator to congress while he was speaker of the senate of *Pennsylvania*; and he continued to sit in the state senate even after the third of *March*, though his right was disputed, and the question was brought to debate and decision before one or both houses of the legislature. Dr. *Leib*, a member of assembly from this city, held his seat in the house, for some short time after his election, to supply a vacancy in the *United States* senate. I do not know that, as to him, the matter was disputed. But afterwards, General *Lacock* and Mr. *Roberts*, being chosen members of congress while they were in the senate of the commonwealth, they themselves voluntarily brought before the senate the question of their right to continue members of that body after the term for their service in congress had commenced. Mr. *Wayne*, chairman of the committee to which the subject was referred, brought in an argumentative and able report denying the

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right. But this decision of the committee was reversed by the senate, and the two gentlemen continued to hold their seats after their term for service in congress had commenced. In strict conformity with all these precedents, General *Barnard*, while holding an office expressly named in the constitution, that of secretary, being elected *United States* senator, did, as we all know, continue to hold the office of secretary of the commonwealth until last *November*. Rightly, in my opinion, according to old construction and precedents. But if the ancient rule of rigid literal interpretation were to be abandoned, it would seem to me that the arguments in this case, relative to the employment of Mr. *Binns*, by the *United States*, to print the laws in his newspaper, being prohibited to him as an alderman; are exceedingly light compared to the arguments which will suggest themselves in all the other cases mentioned.

To finish the chain of authorities, we have the decision of this court in the case of Mr. *Dallas*. He held a commission under the *United States*. He was, at the same time, recorder of the city of *Philadelphia*, and, as such, his chief duty was that of judge of an important court of *Pennsylvania*. The word in the constitution, under which the case was decided, is *judge*. Mr. *Dallas* was *judge* in effect; in name, *recorder*. The argument was identically this, as reported in 4 *Dall.* 229: that the recorder of *Philadelphia* is a judge, and that the policy of the exclusion originated in a jealousy lest the federal government should overshadow the state governments; and if there was a doubt upon the subject, that policy required a decision affirming the incompatibility of the offices in question. But this court unanimously answered, no; and held that the doubt and uncertainty of the letter was to have an operation directly the reverse.

As to the argument of the influence of contract being much more strong and effectual than all the influence of office, and therefore to be guarded against, this may be true. Probably the money expended by the *United States* upon contracts may amount to many times more than all the fees and salaries of their officers. But this, I take it, being quite as well known to our legislators as it can be to us, had they intended to include contracts in the prohibition, they would have said so, and not have left such a most extensive and important provision merely to construction and argument; while they are careful to specify and name, in the law, so many other very inferior matters. What language do reasonable men make use of when they are framing a penal law, which they wish people to understand, declaring offices and contracts incompatible? The law of congress on the subject will give us the fullest answer. (4th *Vol.* 166.) And the canal bill lately pending, or now pending, before our legislature, will also show us what words are used in a law where contracts are prohibited to public men.

Therefore, as, in my opinion, this case of Mr. *Binns* comes not within the words of the rule, nor within the meaning of it, nor can

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be brought within either, unless by a construction which has never yet been applied against any officer in the state, I am against the motion.

HUSTON, J., concurred.

ROGERS, J.—The facts of this case are comprised within a narrow compass. The 2d of *Dec.* 1822, the respondent, at that time and now the editor of the *Democratic Press*, was appointed one of the aldermen of the city of *Philadelphia*. The 13th of *November*, 1825, under an act of congress, passed the 20th of *April*, 1818, the secretary of state authorized the respondent to publish in the *Democratic Press*, the acts and resolutions of congress, for the session of 1825, and, by an instrument of similar import, dated the 7th of *December*, 1826, for the session of 1826, 1827. The question is, whether, by becoming the publisher of the acts and resolutions of congress, under the authority as above stated, the respondent ceased to be an alderman. And this will depend on the construction of the 8th section, and second article of the constitution of *Pennsylvania*, the act of assembly of the 12th of *February*, 1802, and the act of congress, to which reference has been made in the statement of the case. It is for the public interest, that the right, by which a citizen claims the exercise of judicial powers, should be free, even from suspicion; and, although I, in common with the other members of the court, regret the occasion which has given rise to this controversy, yet, as a question in which every citizen has a deep stake, it is not to be regretted that an opportunity has been afforded, to test the validity of the claim of the respondent to the office he now holds.

As the question so materially depends on the meaning of the eighth section, and second article of the constitution of *Pennsylvania*, the act of assembly and of congress, I shall be pardoned for the incorporation of some of their principal provisions into the body of the opinion.

By the eighth section and second article of the constitution of *Pennsylvania*, no member of congress from this state, nor any person holding or exercising any office of trust or profit under the *United States*, shall, at any time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state to which a salary is by law annexed, or any other office which future legislatures shall declare incompatible with offices or *appointments* under the *United States*.

The constitution of *Pennsylvania* was adopted the 2d of *September*, 1790. The constitution of the *United States* was done in convention, the 17th of *September*, 1787; and being ratified by the requisite number, the government went into operation in the year 1789.

It has been supposed that the word appointment in the latter part

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of the section, was introduced without sufficient consideration; that it was, as is contended by the counsel for the respondent, in their ingenious and able arguments, synonymous with *office*. It struck me as singular, that the wise men who framed this charter of our rights, should use a word altogether tautologous, and without any apparent intended effect in an instrument, every word of which, I had always believed, was fraught with the most precise, and definite meaning. And this led me to a more attentive investigation of the import of the term, which satisfies me, such an error has not been committed. The convention had before them the constitution of the *United States*, as is apparent, from the instrument itself, and were possessed of a full knowledge of the offices and appointments, then held and exercised under the federal government. The convention provided against (and there never was any necessity of going further,) the offices, as they were then held and exercised under the government of the *United States*, at the adoption of the constitution, and made them incompatible with certain enumerated offices in the eighth section.

The members of the convention, however, reflected that the government of the *United States* might fall into the hands of men, whose aim was consolidation, or individual advancement, who might multiply offices, under the name of appointments, and by this means obtain an undue influence in the state. With that prudent forecast, for which they are so much distinguished, and for purposes of counteraction, a shield was placed in the hand of future legislatures, giving them the power of enacting, as they may judge the exigencies of the times may require, that the holder of an office under the state government, shall not, at the same time, hold either an *office* or *appointment*, under the government of the *United States*. In my view, the convention have vested in the legislature, a high, discretionary power; and it would ill become this court, without the most cogent necessity, to attempt to circumscribe them in the legitimate use of it. Let the attempt be disguised as it may, (and the convention had thought the attempt possible,) under the term office, appointment, or employment; yet that future legislatures should have the power of declaring such office, appointment, or employment, however denominated, incompatible with offices under the state of *Pennsylvania*. It is evidently a power vested in the legislature, of enlarging the list of offices, or appointments, rendered incompatible by the constitution itself.

By providing, that no persons holding an office of trust or profit under the *United States*, shall, at the same time hold any office under the state, which *future* legislatures shall declare incompatible with offices, or appointments, under the *United States*, the convention has expressly authorized the legislatures, to carry the principles further in its details, than they thought proper, or necessary to do themselves, and to apply it to new cases, by giving a practical exposition to ambiguous terms, purposely left so in the

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constitution; thus vesting in the legislature a latitude of authority, which it is not competent for this court to restrain.

Whether this was a salutary jealousy, is not for us to inquire. It is part of the history of the country, that a jealousy did exist, which, perhaps, it is matter of regret, has not much abated in more modern times.

The convention have carefully distinguished between an office and appointment. When they speak of the *United States*, the words office or appointment are used; when in reference to *Pennsylvania*, it is confined to office. That which future legislatures have the power of making incompatible with an office or appointment, under the *United States*, must be strictly an office. And in proof of this idea, it will be found, that all the officers declared incompatible by the legislature, are strictly so within the meaning and words of the constitution. They are justices of the peace, mayor, recorder, burgess or alderman, physician of the *Lazaretto*, judge, inspector or clerk of elections, clerk of the Court of Quarter Sessions and Orphans' Court, and deputy surveyor.

An office (*officium*.) is defined by Sir *William Blackstone*, to a right to exercise a public or private *employment*, and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as bailiffs or receivers, and the like.

Officers are public or private; and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer when his authority is confined to narrow limits; because it is the duty, and the nature of that duty, which makes him a public officer, and not the extent of his authority. *Carth.* 479.

The word office, in the constitution of *Pennsylvania*, and the *United States*, is a term of the most extensive signification, and includes almost every employment of a public nature, holden immediately from the government, or the people themselves. The constitution of the *United States* contemplate two classes of officers; the superior officers, such as the heads of the department, to be appointed by the President of the *United States*, by and with the advice of the senate; and inferior officers, such as are provided for in the second paragraph and second article of the constitution of the *United States*.

Congress may, by law, vest the appointment of such *inferior officers* as they think proper, in the president alone, in the courts of law, or in the heads of department.

By virtue of this section it was, that congress vested the power of appointment of printers "by authority" in the secretary of state. But whether this be an *inferior* office, in the strict meaning of the word, it is unnecessary to determine, as we consider the word appointment, especially as explained by the act of assembly of 1802,

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even more comprehensive, and so intended by the framers of the constitution of *Pennsylvania*

Every office is an appointment or employment, but it does not follow that every appointment is an office. They are not convertible terms. For instance, the attorney general holds an appointment as well as an office, his deputies an appointment; and this is one of the reasons, and the most cogent, that deputy attorneys general are eligible to the legislature, although the attorney general is not. The disqualification created by the eighteenth section of the first article of the constitution, extends to a person holding an office. It does not in terms embrace the case of a person who holds an appointment merely; and this is one of the reasons urged for the claim of the right of the legislature to name canal commissioners, and other appointments of a similar nature. That the word appointment is sometimes used as synonymous with office, is admitted; but it is submitted, that it is not so to be understood in the section now under review.

I do not find that the word appointment, as used in the eighth section, has received a judicial definition, nor has it been defined by our most approved lexicographers. The constitution, however, has received a legislative construction in the act of the 12th of *February*, 1802. The legislature, with a recent decision of the Supreme Court before them, (*The Commonwealth v. Alexander James Dallas*, 3 *Yeates*, 300,) passed an act, entitled, "An act declaring the holding of offices, or appointments under this state, incompatible with the holding or exercising offices or appointments under the *United States*."

Sect. 1. "Every person who shall hold any office or *appointment* of profit or trust under the government of the *United States*, whether a commissioned officer or otherwise, a *subordinate* officer or *agent*, who is or shall be *employed* under the legislative, executive, or judiciary departments of the *United States*, and also every member of congress, is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, mayor, recorder, burgess, or *alderman* of any city."

The act of assembly seems to have been penned with great care, and, it must be admitted, is very comprehensive in its terms. It extends to every person who holds either an office or appointment, whether a commissioned officer or otherwise, or a subordinate officer, or *agent*, who is or shall be *employed* under the legislative, executive, or judiciary departments of the *United States*. The legislature seem to have anticipated evasion, and for us to give the terms they have used a narrow and confined interpretation, would, in my opinion, (and I speak with the utmost deference to my brethren who dissent from me,) be to make and not expound the law. I am unwilling that legal ingenuity should defeat what has been so clearly and explicitly enacted. The legislature should never have

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reason to complain that laws which are within the pale of the constitution, have received other than a fair and candid construction.

When the legislature speak of persons employed under the legislative, executive or judiciary department, they do not intend an occasional employment, such as those stated at the bar, of a cabinet maker, tailor, &c., who are paid for some job work done for the public service, but they intend an employment, permanent in its nature, and implying trust and confidence. It is the nature of the duty which brings the case within the act of assembly. And this is illustrated by the case cited from 2 *Sid.* 142. There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, plough land, herd a flock, &c., which differ widely from that of steward of a manor. From these considerations, I have come to the conclusion, after a complete examination, that the legislature have not exceeded the limits of the constitution, by the extension of a power, wisely intrusted to them, of meeting, by legislative enactments, attempted evasions of the provisions of the constitution. The act of 1802 is therefore to be construed as if it had been originally incorporated into those provisions. And this leads to the inquiry whether the respondent has accepted an office, appointment, or employment, incompatible with the office he holds under the state of *Pennsylvania*. This will appear from an examination of the act of congress of the 20th of *April*, 1818, and of the arguments of the respondent's counsel.

The first section of the act, entitled, "An act to provide for the publication of the laws of the *United States*, and for other purposes," provides, that, at and during the session of each congress of the *United States*, the secretary of the department of state, shall cause the acts and resolutions, passed by congress, to be published in one newspaper in the district of *Columbia*, and in three newspapers in each state and territory. In the third section it is enacted, that the proprietor of each newspaper in which the laws, resolutions, treaties, or amendments, shall be published, shall receive as full compensation therefor, at the rate of one dollar for each printed page of the laws, resolutions, and treaties, as published in the pamphlet form, in the manner herein directed. And if it shall appear in the examination of any account, that there has been any unreasonable delay, or intentional omission, in the publication of the laws aforesaid, the proper accounting officer of the treasury, is hereby authorized and required to deduct from such account, such sum as shall be charged therein, for the publication of any laws, which shall have been so unreasonably delayed or intentionally omitted. And in any such case, it shall be the duty of the secretary of state to discontinue the publication of the laws in the newspaper, belonging to such proprietor, and said *newspaper* shall in no event be again *authorized*, nor shall the *proprietor* thereof be

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again *employed* to publish the laws of the *United States*. It is the emphatic language of the act, that such newspapers shall in no event be again authorized, nor shall the *proprietor* thereby be again *employed*, to publish the laws of the *United States*. To be again employed, necessarily supposes that his appointment was an employment within the purview of the act of congress, which brings the case within the words and intent of the act of the 12th of *February*, 1802.

The object of the act of congress, after providing for an appointment by the secretary of state, appears to have been, to secure the faithful and punctual performance of the trust. And their solicitude will appear from the severity of the penalties imposed, which are all, as cannot fail to be observed, on the proprietor himself. Unreasonable delay, or intentional omission, is punished by deduction of the sum charged for the publication. The secretary of state is directed to discontinue the publication of the laws in the newspaper, belonging to such proprietor. Such newspaper shall in no event be again authorized; and lastly, the proprietor himself shall not be again *employed* to publish the laws of the *United States*.

The prohibition of any future publications in the newspaper is a penalty on the proprietor, and intended to prevent him, by sale of the newspaper, attempting to secure himself from the effects of his delinquency.

It may afford us some light, to inquire into the construction which has been given to the act of congress, by those in whom the right of appointment was vested. The act may, in some measure, be considered as having received a cotemporaneous exposition, entitled to more weight, from the character of the distinguished statesmen and jurists who presided over the department of state. The authority under which the respondent acts, prepared no doubt with a single eye to the import of the act of congress, is contained in a letter from *H. Clay*, secretary of the state, to the editor of the *Democratic Press*. In this, it is expressly called an appointment. "It is expected that, under the present *appointment*, you will conform to the custom, without additional charge, however, on that account." Again: "And, that you may the more easily distinguish those, which, under this appointment, are intended for publication," &c.

From the letter of the secretary of state it is also manifest, that it is the respondent, and not the newspaper which receives the appointment. It contains specific and precise directions for his government, and prescribes the mode of transmitting and receiving his accounts. It is an appointment in some measure fiduciary; connected, however, as it ought to be, and necessarily must, with the newspaper; the medium through which the proprietor, by authority, publishes the acts and resolutions of congress.

The *National Journal* is to be transmitted to the respondent; and, when he misses a number, he is directed to apprize the de-

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partment of the circumstance, that the omission may be immediately supplied.

The circulation and usefulness of a newspaper depends upon the talents and industry of the editor. It is the respondent who gives life and character to his *Journal*: and who is so inattentive to the passing occurrences of the day, as not to know that the publishers of the acts and resolutions of congress have been *sometimes* selected for their zeal and talents as partisan editors? Are we to believe it was the *Democratic Press*, and not the respondent, that was in the view of the secretary of state when he made the selection? I mention this, not with the view of censuring the course pursued, but for the purpose of showing the motives and reason which may have induced the selection.

The appointment of publisher of the acts and resolutions of congress has been considered, and I may add used, as part of the patronage of the secretary of state; nor, perhaps, is it going too far to say that it was so intended by congress.

It has been contended, with great earnestness, that this is a contract, and not an appointment. It does not strike me, that it can be considered any more in the light of a contract than any appointment to which a salary is affixed, or certain compensation attached. It amounts to an engagement, that whilst the appointment continues the duties shall be performed.

Unreasonable delay, or an intentional omission, would not subject the respondent to suit for breach of contract. The penalty is prescribed, (and is sufficiently severe,) in the law itself. Could it be contended, with any prospect of success, that if the respondent discontinued the publication of the *Democratic Press* altogether, he would subject himself to suit for breach of contract by the *United States*? Was that the intention of congress when they passed the act of the 20th of *April*, 1818? If so, neglect, in the eye of congress, must be a highly penal offence, punishable by forfeiture, and by suit also.

If congress considered this a contract, why was it not so denominated as in the 7th section? also, why was not surety required for the faithful performance of the contract?

A mere *contract* would not give the work executed under it the stamp of official authority. If the agency of the respondent were merely mechanical, it would require an act of authentication and publication to be superadded by his employer, such as a certificate of the accuracy of the copy, and of its having the sanction of the government, as has sometimes been practised in regard to the laws of our own state. Instead of this, the newspaper printers of the laws of the *United States* usher them in with the words, "by authority." This is an assertion of official authority in the *printer* to give to his art the authenticity of an act of the government. And it does in fact acquire that sort of authenticity by being thus published. In *Biddis v. James*, (6 *Binn.* 321,) the copy of a private act of

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assembly, printed under the authority of the state, was admitted without producing an exemplification of the original roll. Would the mere job work of a printer, employed by the department for mechanical purposes, be received as evidence without any other act of authentication than such as he should be competent to execute? In *Biddis v. James* there was a certificate by the proper officer, that the printed copy had been compared with the roll; and there no doubt the printer was employed only as a mechanic. Here, however, there was no act of authentication by the department; and yet a private act of congress, published by the respondent, would have been admissible in courts of justice. It certainly would have been entitled to more respect than a law published by a printer of his own head. But, whenever a printer is employed by the government for any but mechanical purposes, his duties are essentially official. Here the respondent was not even to be furnished with a copy by the department, but was to watch the files of the *National Journal* for what he was to furnish; and report any failure that should occur in the regular transmission of that newspaper to him, &c. He was to exercise a supervising agency, subject to the control of the department, and receive a stated compensation, not for any particular job, but for his services while he should remain in the service of the public; and in this it is difficult to distinguish the relation which he was to bear to the government, from that of any other subordinate attached to the department. The very nature of the employment of a printer, "*by authority*," is essentially *official*. It would be extraordinary, indeed, that that which may be the result of personal confidence, could be transferred to a person in whom the appointing power placed no confidence. This is evidently not the intention of the framers of the act of congress, which does not contain a word on the subject, and it would be matter of regret if it admitted of any such construction. It might pass into the hands of a personal enemy; nay, the patronage of the executive department of the government might be a means of annoyance in the hands of an alien enemy; and this is an argument to show that it is the proprietor, and not the newspaper that is in the view of the act of 1818.

Cases of contracts, in special cases, have been stated, and it has been asked, whether they are within the 8th section of the constitution? The act of assembly, which is explanatory of the constitution, does not intend an occasional contract, as was before observed, but a permanent employment. These cases might be multiplied without end, without elucidating this case in the slightest degree. When the legislature has clearly manifested an intention to embrace the cases supposed, it will be for this court respectfully to say whether the acts be in accordance with the principles of the constitution.

The case of Mr. *Biddle* has been relied on by the counsel of the respondent. *Charles Biddle*, at the time a member of the

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senate of *Pennsylvania*, accepted an appointment under the third section of an act of congress to authorize the issuing of treasury notes: "That the said treasury notes shall be respectively signed in behalf of the *United States*, by persons to be appointed for that purpose by the president of the *United States*."

It was contended, but without success, that the acceptance of the appointment by the president vacated his seat in the senate. The question arose, in the eighteenth section of the first article of the constitution.

"And no member of congress or other person holding any *office*, (except of attorney at law and in the militia,) under the *United States*, or this commonwealth, shall be a member of either house during his continuance in congress, or in office."

We are left in the dark as to the reasons of the senate, which may have been as various as the members themselves. The result we know, was, that Mr. *Biddle* retained his seat. Although I entertain the most sincere respect for the member of the government which made the decision, yet it may well be doubted, whether they did not take a narrow view of the import of the term *office*, as used in the constitution of the *United States* and *Pennsylvania*. That it was an *inferior* office within the meaning of the 2nd paragraph, 2nd section, 2nd article of the constitution of the *United States*, would not with me, have admitted of much doubt.

The decision of the senate, as I understand it, amounts to this and no more, that Mr. *Biddle* held an appointment and not an office, and was, perhaps, justified in senate by considerations such as these, which may seem to illustrate the distinction between an office and appointment. The act of congress terms it an appointment, not an office. It is made by the president alone, and not by and with the advice of the senate. The 18th section of the 1st article of the constitution of *Pennsylvania* speaks of office, and not office or appointment; and, lastly, when the convention intend a distinction between an office and appointment, they make it with sufficient precision and clearness, as is apparent from the 8th section of the second article, now under review.

Another consideration may have been suggested. The attorney general cannot be a member of either branch of the legislature, but his deputies may; because, the one holds an appointment, the other an office.

If the 18th section of the 1st article, had used the term *office*, or appointment, it is difficult to perceive how they could have sustained the right of Mr. *Biddle* to his seat. Had that been the case, a different result would most probably have been the consequence. The decision of the senate does not, therefore, in my judgment, govern this case; neither do I think the point affected by the decision of the same body, on the question of vacating the seats of Messrs. *Barnard* and *Markley*, for the reasons before stated, and which it would be useless to repeat.

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What authority can the employment of a person to do a job as a mere mechanic confer? If it be an employment for general purposes of supervision, not generally involved in the mechanical part, it is another matter: that would be a substitution of the party employed for the party who employs him, and the former would act by virtue of a delegated authority. Under the act of congress, it would be refining too much to say that the secretary is the publisher of the laws, and the editor the publisher of the other matter contained in his newspaper: yet that consequence would be inevitable, if the newspaper, and not the editor, was employed as an instrument of publication. Some one must be the publisher, and, if he is not the editor, who is he? The editor is necessarily both printer and publisher; and, if so, he must be the depository of an authority to publish. It is not easy to comprehend what is meant by an authority vested in a newspaper, distinct from the editor. By the act of 1818, the secretary of state is required to cause the acts of congress to be published "in not more than three newspapers in each of the several states." But he is not expressly required to designate the particular papers, although that be altogether proper, to prevent the persons employed by him from publishing in obscure papers, of limited and partial circulation. The authorizing a newspaper is mentioned, but this is in reference to a newspaper which has been employed, but abandoned for misconduct of the editor; and, in such case, it is said such *paper* shall in no event be again authorized. But, it is instantly added, "Nor shall the *proprietor* thereof be again *employed*." One of the objects intended to be effected by the use of these expressions, was to prevent a defaulting editor from continuing to enjoy the patronage of the government, by the contrivance of a sham transfer of his paper, or a change of its title, not to force on the secretary to the absurdity of vesting authority in an inanimate and irresponsible thing. Printers of legislative bodies are *elected*, which shows that their relation to the public is *official*; and that the printers of the laws, under the act of 1818, are not eligible in the same manner, is owing entirely to the circumstance, that the power of appointment is vested in an individual.

Whether the respondent can resign his appointment, in the common acceptance of the term, it might be needless to inquire. But, suppose this could not be done without the consent of the secretary, I do not perceive that it necessarily follows, that this is a contract, and not an appointment. Officers in the army or in the navy, and foreign ambassadors, cannot resign *ad libitum*; and yet there is no question that they hold offices or appointments under the government of the *United States*.

Congress have not considered that it was necessary to put it on the footing of a contract. They have instituted a penalty only for neglect, evidently on the ground that the public interest would not suffer, as there would be no difficulty in procuring the proprietors

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of newspapers at the same rate to publish the laws of congress. The public interest will not suffer by permitting editors to decline the further publication of the laws, upon proper notice to the secretary of state; and that they would have this power I have no doubt. Such was, in my opinion, the understanding when the law passed.

The act of congress of the 20th of *April*, shows the difference, in the opinion of congress, between an appointment and a contract. When they intend a contract they expressly say so, as in the 7th section. They direct the secretary of state to require two good and sufficient sureties for the faithful performance of the contract; they speak of it as an agreement. They do not by the terms designate the persons, but leave it altogether to the discretion of the secretary to make such contract as may be most advantageous to the public. I think it will be found, that in all cases of contracts under the laws of congress all the formality of agreements are observed, and that ample security is required; as contracts for the army, navy, the post office, and the like.

Believing, therefore, that the respondent has accepted and now holds an office or appointment under the executive department of the *United States*, within the meaning of the 8th section of the 2nd article of the constitution of *Pennsylvania*, and the act of assembly of the 12th of *February*, 1802,—I am of the opinion, that by the acceptance of the one he vacated the other, and that he is no longer an alderman of the city of *Philadelphia*.

I have forbore to notice his appointment of stationer for the custom house, as I do not consider that as varying the case.

GIBSON, C. J., concurred with ROGERS, J.

SMITH, J.—This is an application for a rule to show cause why an information in the nature of a *quo warranto*, should not be filed against *John Binns*, to inquire by what authority he exercises the office of an alderman of the city of *Philadelphia*. After hearing, with attention, the ingenious and elaborate arguments of the counsel, I applied my mind diligently to the consideration of the questions involved in this case; and the more anxiously, because, from the division of the court, I must necessarily differ from two of its members, whose judgments I highly respect. Having formed my opinion, I will proceed to state the reasons upon which it is founded: if they should prove unsatisfactory to others, they have convinced my understanding, and that must govern me. The constitution of *Pennsylvania*, article 2d, section 8th, ordains, that “no member of congress nor any person holding or exercising any office of trust or profit under the *United States*, shall at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state to which a salary is by law annexed, or any other office which fu-

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ture legislatures shall declare incompatible with offices or appointments under the *United States*." It is obvious that the convention deemed the offices designated in this section, to be all that ought to be included in the prohibition. Conformably to the provision authorizing future legislatures to declare any other offices than those enumerated, to be incompatible with offices or appointments under the *United States*, the general assembly passed the act of the 12th of February, 1802, entitled, "An act, declaring the holding of offices or appointments under this state, incompatible with the holding or exercising offices or appointments under the *United States*," by the first section of which, it is enacted, "that every person who shall hold any office or appointment of profit or trust under the government of the *United States*, whether a commissioned officer, or otherwise; a subordinate officer or agent, who is or shall be employed under the legislature, executive or judiciary departments of the *United States*, and, also every member of congress is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, mayor, recorder, burgess or alderman, of any city, corporate town, or borough, resident physician of the Lazzaretto, constable, judge, inspector or clerk of election, under this commonwealth." By the 2nd section, the holding of any of the aforesaid offices or appointments under this state, is declared to be incompatible with any office or appointment under the *United States*; and, by the 2nd and 3d sections, every such commission, office or appointment, so holden under the government of this state, contrary to the true intent and meaning of this act, is declared to be null and void, and every person who shall exercise any offices or appointments, the exercise of which is declared to be incompatible, shall, upon conviction, forfeit and pay any sum not less than fifty nor more than five hundred dollars. Such are the penal inflictions of this act, and severer they ought not to be. It is true, as was urged by the counsel for the relator, the act does not inflict corporal punishment on the offender, but that is not an essential feature of a penal law. I am perfectly satisfied, that this is a penal act, and that it should therefore be construed strictly.

The facts which, it is alleged, invalidate the commission of the respondent as an alderman, and subject him to the penalty of the act just recited, are the letters of the secretary of state, received in December, 1825, 1826, and 1827, the publication of the orders, resolutions, laws, and treaties, of the *United States*, in his paper, the *Democratic Press*, and his receiving compensation therefor.

In the month of December, 1825, the editor of the *Democratic Press* of Philadelphia, received from Henry Clay, secretary of state, a letter dated the 13th of November, 1825, which contains the following paragraph:—"Your newspaper has been selected as one among the number designated for publishing the orders, resolutions, and laws, except such as are of a private nature, and public

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treaties with the exception of *Indian* treaties, which may be approved and ratified during the first session of the nineteenth congress." In *December*, 1826, the same editor received from the secretary of state a letter dated the 7th day of that month, authorizing him in the same terms to publish in the *Democratic Press*, the orders, resolutions, laws, &c., of the second session of the nineteenth congress; and in *December*, 1827, he received a third letter, dated the 7th day of that month, from the secretary of state, authorizing him to publish in the *Democratic Press*, the orders, resolutions, laws, &c., of the first session of the twentieth congress. These letters also give directions in case of a sale or transfer of the newspaper, or of a change in its title, that notice of the fact should be communicated to the department of state, in order to obviate any difficulty as to the person entitled to the compensation; and the last two letters conclude as follows:—"If you should omit to give this department the notice thus required, the amount due will be paid to the person first applying for it, as the person best entitled to the same."

It is admitted, that, in pursuance of those letters, the orders, resolutions, laws of a public nature, and public treaties, except *Indian* treaties, approved and ratified during the several sessions of congress mentioned in the letters, were printed and published in the *Democratic Press*, and payment for the publication thereof was received by the respondent, as editor of that paper. It is also admitted, that on the second day of *December*, 1822, *John Binns* was duly commissioned an alderman for the city of *Philadelphia* by Governor *Hiestor*; and, at the time the letters were received, he was, and he still is, one of the aldermen of this city. Is he, then, an officer under the government of the *United States*, or has he an appointment under that government, in the sense and meaning in which those terms are used in the law. The terms applied to the disqualifying employment are, "office or appointment," and on the part of the relator it is admitted that they are synonymous: the language of the act is, "Every person who shall hold any office or appointment of profit or trust under the government of the *United States*, whether a commissioned officer or otherwise;"—and perhaps the only distinction between those terms, as there used, is, that by *office* was meant an appointment with a commission, and by *appointment*, an office without one. The distinction is immaterial. As to the meaning of the word *office*, there is a diversity of opinion, particularly in regard to the extent of its import. *Blackstone* defines it to be—"a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as of bailiffs, receivers, and the like." 2 *Comm.* 36. The late Chief Justice *TILGHMAN*, in *The Commonwealth v. Sutherland*, 3 *Serg. & Rawle*, 145, remarks, that this word is of a very vague and indefinite import. Every thing concerning the administration of

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justice, or the general interests of society may be supposed to be within the meaning of the constitution, especially if fees or emoluments are annexed to the office. But there are matters of temporary and local concern, which, although comprehended in the term office, have not been thought to be embraced by the constitution. In 1822, the Supreme Judicial Court of the state of *Maine*, consisting of MELLEEN, Chief Justice, and PREBLE and WESTON, Justices, in an opinion given to the governor of that state, say that the terms office and officers, as used in the constitution of *Maine*, where it prescribes an oath of office to all legislative, executive, and judicial officers, imply a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office, and that a person clothed by a resolve of the legislature with no other power than those of superintending the public lands, and performing certain acts in relation to them, under the discretionary regulation of the governor, was not an officer, and therefore was not required to take the oath. 3 *Greenleaf's Rep.* 482. The constitution of the *United States* prescribes an oath of office to be taken by all executive and judicial officers. It does not appear that any oath has been required of the respondent in consequence of the selection of his paper as one of those designated to publish the laws and treaties of the *United States*; nor is it pretended or alleged, that he ought to have taken an oath. How then can it be seriously contended that he is an executive officer? Surely, if he were so, it would have been highly proper that he should have been sworn to discharge the duties of his office with fidelity in order to guard the office, by that obligation, as far as possible from abuse. Indeed, it would have been essentially requisite for him to take the oath prescribed by the constitution of the *United States*.

There are two cases in which the senate of *Pennsylvania* has given a construction to the eighteenth section of the first article of the constitution, which ordains that no member of congress, or other person holding any office (except of attorney at law and in the militia,) under the *United States* or this commonwealth, shall be a member of either house during his continuance in congress, or in office. An act of congress having authorized the issuing of treasury bills or notes, the president was empowered to appoint certain commissioners to sign them, and for that service the commissioners were to be compensated. Mr. *Charles Biddle*, a member of the senate, received from the president of the *United States*, an appointment as commissioner under that act of congress. He performed the service, and received the compensation. This case was brought before the senate in 1812, and that body decided, by a vote of twenty to eight, that Mr. *Biddle's* seat was not vacated. *Journals of the Senate*, 1812, page 33—143. The decision has since been recognised as a valid precedent by this court, in determining the construction of the word *office*, in article 5th, section 2d, of the constitution. *Shepherd v. The Commonwealth*, 1 *Serg.*

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& *Rawle*, 1. The answer which has been suggested to this case,—that the senate may, from courtesy, have permitted Mr. *Biddle* to retain his seat, is not satisfactory or correct. Had there been any foundation for such an idea, the Supreme Court would not have paid the slightest regard to the vote of the senate; whereas they have made it a basis of their own judgment in the case to which I have just referred. Here, then, is an appointment by the President himself of a commissioner to sign treasury bills, which service the commissioner accordingly performed, and for which he received compensation; the senate solemnly decided that this was not an *office*, and this court has sanctioned the decision. The other case was that of *I. D. Barnard* and *Philip S. Markley*, who held the appointment of deputies under the attorney general of this commonwealth, at the same time that they were members of the senate. The decision in this case, in *December*, 1820, by a vote of twenty-five to two, in the same body, goes to confirm the construction in the former case of Mr. *Biddle*. And, as the sections of the constitution to which these decisions relate, and that on which the act of 1802 is founded, though distinct, are in *pari materia*, it is reasonable to infer that the word *office*, in all of them, was used in the same sense.

The letters of the secretary of state are in strict conformity to the act of congress, entitled, “An act to amend the act, entitled, ‘An act to provide for the publication of the laws of the *United States*, and for other purposes,’ ” passed the 11th day of *May*, 1820. That act does not authorize the secretary of state to grant an office or appointment to the printer; but merely to cause any order, resolution, or law passed by congress, except such as are of a private nature, and all public treaties, except *Indian* treaties, to be published in a number of public newspapers, not exceeding one in the *District of Columbia* and not more than three in each of the several states and territories of the *United States*. There is no other act that I can find, (and I have searched diligently,) which authorizes such an appointment. If, then, those letters are to be construed as conferring an office or appointment, it is evidently one not known to the constitution and laws of the *United States*. But it is urged, that the respondent is *employed* under the *United States*, and is therefore within the true intent and meaning of the act of assembly. If the employment be such as to bring him within the act, he must be an officer, or, in other words, must hold an office. It is to be observed, that there is a material difference between an office and an employment. For, although every office is an employment, yet there are many employments which do not come under the denomination of offices, being ordinary engagements or contracts; such as, for instance, an agreement to make hay, plough land, &c. 2 *Sid.* 142. 3 *Greenleaf’s Rep* 482. Now the employment of the editor of the *Democratic Press* has none of the peculiar features of an office,—nothing, in short, to distin-

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guish it from an ordinary contract in the usual course of business.

Is the selection by the secretary of state of the *Democratic Press* as one of the three newspapers designated in *Pennsylvania*, a stipulation attached to the paper, or to the proprietor? Clearly, I think, to the paper; since it cannot be doubted, that if the proprietor had immediately after transferred his establishment, it would have carried along with it into the possession of the transferee, the privilege of publishing the laws and treaties, which the selection had conferred. Such was evidently the expectation and understanding of the secretary of state. If the selection, on the contrary, were attached to the proprietor, as an office or appointment, it could not be transferred. It would not go along with the paper into the hands of a vendee; because offices in this country are neither bought nor sold. The intention and effect of the selection are to convey useful intelligence to the public, through a certain known medium, and nothing more. The selection may be at the will of the secretary, but until he signified to the proprietor of the paper, no matter how often it might have changed hands, his determination to have the laws and treaties printed and published elsewhere, the privilege would belong to that paper in virtue of the selection. The tenth proprietor in succession, would have had the same right to demand the compensation that *John Binns* had, and would have received it pursuant to the regulations of the department of state. In order further to elucidate my view of this subject, I will suppose one or two analogous cases. The secretary of the navy requires a quantity of ship timber. His agents are sent into the interior of *Pennsylvania*, and, after an extensive inspection, it is discovered that I have a tract of timber land most suitable for the purpose. He thereupon informs me, by letter, that the navy yard in *Philadelphia* is in want of a certain number of knees, beams, &c.; and that, on the report of the agents employed by the department, a wood belonging to me, situate in *Bern* township, *Berks* county, had been selected as one of the number designated for the purpose of furnishing the requisite supply, provided I should accede to the accompanying proposals. I accede to them, accordingly. Is this an office or appointment of profit under the navy department? Can I be said to hold, by reason of this contract, an office or appointment under the *United States*, as a subordinate officer or agent of the navy department? Surely not. The selection attaches to the thing, not to the person. To the person it is merely incidental as the owner; so that when he ceases to be the owner, he necessarily ceases to enjoy the advantage derived from the stipulation. If I sell my wood, the supply is still carried on, the contribution of timber does not cease, though the vendee, not I, receive the profits. Again, an administrator applies to a printer:—"Your paper circulates more extensively than any other in the neighbourhood of the intestate's estate. I wish you to publish our advertise-

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ments and notices, for which you shall be paid the regular prices." Can the printer be said to hold an office or appointment under the administrator, on account of this application? Is it in reality any thing but a common engagement in the usual course of his trade or business? It may be called an employment, but is not known or considered as an office. Suppose the secretary of the treasury says to a stationer, "Sir, you will please to furnish for the use of this department, so many reams of paper, so many quills, so many pounds of wafers, at the beginning of each month, until further orders." Is this an office or appointment, in the common acceptation of those terms? Is it any thing more or less than an ordinary contract? I think not.

Indeed, to give the act of 1802 the latitude of construction contended for on the part of the relator, would, in my opinion, constitute every one an officer under the *United States*, who should, in pursuance of an agreement, print and publish a notice or perform any other service for any of the departments or their agents. Such could not have been the design of the convention who framed the constitution of *Pennsylvania*, nor of the legislature who passed the act of 1802; and, upon the principle of construction applicable to that act, as a penal statute, we are not authorized to indulge in a latitude of interpretation for the purpose of embracing a case, which might even appear to be within the reason of its provisions, but which was not within its terms. Whether we regard the term office as it is defined by legal authorities, or as it is employed in the constitution and laws of the *United States*, or as it is explained by decisions upon other sections of the constitution of *Pennsylvania*, in which it is used, or finally according to the common acceptation of the word, it does not appear to me that the printing and publishing of the orders, resolutions, public laws, treaties, &c. of the *United States* in the *Democratic Press*, in pursuance of the letters of the secretary of state, is an office or appointment within the true intent and meaning of the act of assembly in question; and, under all the circumstances shown to the court, it cannot be said, that the respondent, as editor of that paper, holds an office or appointment under the government of the *United States*. I am therefore of opinion, that the rule in this case ought to be discharged.

END OF MARCH TERM, 1828—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

LANCASTER DISTRICT, MAY TERM, 1828.

[LANCASTER, MAY 12, 1828.]

VIRTUE *against* PATTERSON.

APPEAL.

No appeal lies from the order of the Circuit Court directing a *procedendo*.

APPEAL by the defendant from the order of the Circuit Court, directing a *procedendo* in this cause, which had been removed from the District Court of *Dauphin* county to the Circuit Court of that county.

McClure moved to quash the appeal, inasmuch as no appeal lies from the order of the Circuit Court quashing a writ of removal or directing a *procedendo*. This case is not within the enumerated cases of the act of 1799, fourth section.

Elder, contra.—The motion was to set aside a judgment, and so was within the words of the act.

McClure, in reply, was stopped by the court.

PER CURIAM.—An appeal from the judgment or order of a Circuit Court, lies only in cases specified in the act of the 20th of *March*, 1799. These are, “demurrer; special verdict; case stated; point reserved; motion in arrest of judgment, or for new trial; or to set aside a judgment, discontinuance, or *non pros.*” It is clear, then, this appeal cannot be sustained. And it is equally clear that the judgment of the Circuit Court was right, the cause of action palpably appearing to be below the limit of the court’s jurisdiction.

Appeal quashed.

[LANCASTER, MAY 22, 1828.]

SCHLOSSER *against* BROWN.

IN ERROR.

After verdict, a declaration containing in substance the essentials of a cause of action is good.

ERROR to the Court of Common Pleas of *York* county. The plaintiff below, (who was also plaintiff in error,) declared as follows:—

William H. Brown, Esq., late of the county aforesaid, attorney at law, was attached to answer *Jacob Schlosser* of a plea of trespass on the case, &c. Whereupon the said *Jacob*, by *Michael W. Ash*, his attorney, complains,—that whereas the said *William*, on the 29th day of *August*, A. D. one thousand eight hundred and nineteen, at the county aforesaid, was employed by the said *Jacob*, and undertook the care, management, and conducting of a certain suit in the Court of Common Pleas of *York* county, brought by the said *Jacob Schlosser* against one *Amos Gilbert* and *George Haller*, (now deceased,) to *August* term, 1819, No. 45; which suit by the negligence, unskilfulness, and want of care on the part of the said *William*, was rendered inoperative, lost, and of no effect against the said *George Haller* and his estate: by reason of which premises the said *Jacob* has been seriously damnified and hurt, and the money claimed in the aforesaid action by the said *Jacob*, amounting to a large sum, to wit, to the sum of two hundred and fifty dollars, has been entirely lost to him the said *Jacob*; whereas, otherwise, he would have recovered and received the same; to the great damage of the said *Jacob* of four hundred dollars, and therefore he brings suit, &c.

Verdict for the plaintiff for two hundred and seventy-one dollars damages.

The court below arrested the judgment for the insufficiency of the declaration.

Gardner, for the plaintiff in error, contended that the *narr.* was good after verdict; and cited *Whart. Dig.* 471, No. 118. 1 *Pet.* 482. 4 *Yeates*, 426, 427. 13 *Serg. & Rawle*, 46. 2 *Yeates*, 539. 10 *Serg. & Rawle*, 158. 13 *Serg. & Rawle*, 99. 7 *Serg. & Rawle*, 309. 1 *Dall.* 461. 1 *Johns.* 276.

Wadsworth and *Lewis*, *contra*, referred to 4 *Burr.* 260. 2 *Johns.* 571. 2 *Mass.* 521. 5 *Serg. & Rawle*, 358.

Gardner, in reply, was stopped by the court.

PER CURIAM, (TOD, J., dissenting.)—This declaration contains in substance all the essentials of a cause of action, which is sufficient after verdict.

Judgment reversed, and judgment entered for the plaintiff.

[LANCASTER, MAY 27, 1828.]

HOWER *against* GEESAMAN and others.

IN ERROR.

An assignment in trust to pay, in the first place, preferred debts, and then all other debts, absolute on the face of it, is null and void against creditors, if the grantor retain and use, and, dispose of the property as his own; and that though the creditor who levies on it has notice of the assignment before his judgment.

Such deed is not void because it contains no schedule, or limitation of time for execution of the trust, or prefers some creditors, or because the grantor was in debt.

Assignees entitled to personal property have sufficient possession to maintain trespass.

ERROR to the Court of Common Pleas of *Lebanon* county.

This action of trespass was brought in the court below by *Geesaman, Krause, and Keller*, defendants in error, against *Hower*, the plaintiff in error, the sheriff of *Lebanon* county, for taking and selling goods upon a *fiery facias* issued against *Adam Rice* at the suit of *Adam Stoever*. The plaintiffs below claimed the goods as assignees of *Adam Rice*, by deed dated the 13th October, 1823, and duly recorded. By this deed, after reciting the grantor's inability to pay his debts by reasons of losses, &c., in consideration thereof, and of one dollar paid, *Adam Rice*, by a general description, transfers all his estate, real, personal, and mixed, to the defendants in error, in trust, to sell with all convenient speed, &c., and pay off first a judgment bond to *John Rice*, (mentioning the sum and the time of payment,) as also two several judgment bonds, one to *Matthias Gilbert*, the other to *Henry Geesaman*, (mentioning sums and days of payment,) both given for the purpose of securing them as bail or surety, as would appear by endorsements on the bonds. Next to pay a debt due to *John Krause* by note, (stating the date,) as also one hundred and fifty dollars to *Samuel Light*, the grantor's endorser to the Farmers' Bank of *Lancaster*. And then to pay all his other debts in equal proportions. Surplus, if any, to the grantor: with a power of attorney to sue for debts, &c. *Stoever*, before he obtained his judgment, was informed by *Adam Rice* of the full contents of the deed of assignment. The sheriff also, previous to the sale, had written notice of the claim of the assignees. But the assignees took no possession of the goods. On the contrary, *Adam Rice*, the assignor, held the possession—carried on the tavern—carried on the hat-making business in a shop with three or four hands—and disposed of and sold the property as his own, as usual, up to the time of the sale by the sheriff. The verdict was for the assignees, the plaintiffs below, and judgment thereupon. The counsel for the defendant below put sundry written propositions to the court, and excepted to the answers. All the alleged errors were

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now abandoned, except what in substance may be included in the answers to the first, fourth, ninth, and tenth propositions.

1st, That the deed of *Adam Rice* to the assignees, without description, valuation, or inventory, for the benefit in the first instance of particular creditors, nominating and appointing the assignees his trustees without consulting his creditors, and without limiting the time for the execution of the trust, is in law fraudulent and void.

Answer of the court—*denied*.

4th. That the deed of the 13th of *October*, 1823, assigning the personal estate of *Adam Rice* to the plaintiffs, is absolute on the face of it, and possession not having accompanied and followed the deed, the same is in point of law fraudulent; the retention of the possession by *Adam Rice*, the vendor, makes the deed absolutely void in law, and that is a matter to be determined by the court and not by the jury.

Answer by the court.—The deed of the 13th of *October*, 1823, assigning the personal estate of *Adam Rice* to the plaintiffs, is absolute on the face of it. The possession not having accompanied the deed does not in point of law make the deed fraudulent, nor did the retention of the possession by *Adam Rice*, the grantor, for seven or eight days from the execution of the deed, to the day the sheriff seized them, make the same absolutely void in law.

9th. That if the jury believe that *Adam Rice* remained in possession of the personal property, used it as he had done before the deed of assignment was executed, this is a fraud in law, and will make void this deed, at least as far as respects the personal property not delivered.

Answer of the court—*denied*.

10th. That a person being indebted at the time he makes an assignment is a circumstance from whence the jury may infer fraud.

Answer by the court—*denied*.

Upon these points the court added, as follows:—A debtor may execute a deed of assignment of all his property to trustees for the benefit of his creditors; and in such deed may give a preference to any creditor he pleases. It has been given in evidence that *Adam Stoever*, the plaintiff in the execution issued on the 20th of *October*, 1823, by virtue of which the sheriff on the same day seized and afterwards sold the goods, had full notice of the said assignment on the 16th of *October*, 1823, before he obtained his judgment on which he issued his said execution. The deed of assignment, unaccompanied by delivery of possession of the goods, or of an inventory or schedule of the same, and the debtor nominating and appointing trustees without consulting his creditors, and without limiting the time for the execution of the trust, is not fraudulent *per se*. They are circumstances which may be taken into consideration, but are not in themselves evidence of fraud. The deed was executed on the 13th, and the sheriff seized these

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goods in execution on the 20th of *October*, 1823, after the plaintiff in the execution had full notice of the deed of assignment; and although the deed is absolute on the face of it, and no actual delivery to the assignees, the mere permitting the property to remain for seven or eight days in the possession of *Adam Rice* does not in point of law make the deed fraudulent. It has also been given in evidence that the sheriff had notice of the plaintiffs' claim to the goods before he sold them. If the jury are of opinion that there is no fraud on the part of the plaintiffs, it will be their duty to find a verdict in their favour for such amount of damages as they think the plaintiffs are entitled to.

Weidman and *Norris*, for the plaintiff in error.—The court below erred in supposing us bound to make out a charge of actual, personal fraud. The deed is fraudulent and void in law. The grantor's relations are made trustees. His relations are put among the favoured creditors. There is no description of the property: no schedule. The creditors have no means of compelling a fair appropriation: no protection against fraud: no means of knowing for what the assignees ought to be held accountable. Our law trusts no man, not even public officers, not even those who give security for their honest behaviour, with goods untold and unknown. If there is a domestic attachment, or a levy by a sheriff or constable, or if an insolvent debtor gives up his property, or a man administers upon an estate, in every instance a schedule or inventory is required. The retaining possession of the goods by the grantor was inconsistent with the deed; it was a legal fraud, and incontrovertible. *Hamilton v. Russell*, 1 *Cranch*, 313. 9 *Johns*. 337. *Ibid.* 342. *Clow v. Woods*, 5 *Serg. & Rawle*, 282. The court erred also in denying that a person being in debt when he makes an assignment, is a circumstance from which the jury may infer fraud. *Pet. Rep.* 454. At any rate the sheriff cannot be liable in trespass. An officer is bound by no constructive possession. Here was no possession in the plaintiffs to support this action against any person. In every case we have found of trespass by assignees in trust for creditors there was actual possession. They cited *Lippencott v. Barker*, 2 *Binn.* 174. *Cunningham v. Neville*, 10 *Serg. & Rawle*, 201. *Martin v. Mathiot*, 14 *Serg. & Rawle*, 214. *Schw. N. P.* 1108.

Elder, for the defendants in error.—The sheriff appears to have taken an indemnity. He had express notice of the transfer. But that is not necessary to the case of the defendants in error. If upon an execution against one, the sheriff takes the property of another, he is responsible to the owner: and upon no principle of law can his case be distinguished from the case of *Stoever*, had *Stoever* been defendant. The preference given by the deed of assignment is not illegal. It is the invariable practice. It is supported by all the decisions in *Pennsylvania*. To meritorious creditors a preference is permitted. There is no fraud in the case, either in law

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or in fact, unless in *Stoever*, who attempts to grasp all for himself, and exclude the rest of the creditors by means of a judgment obtained with full knowledge of the assignment. Our case is fully supported by *Wilt v. Franklin*, 1 Binn. 502. In that case there was no schedule, no time limited for the performance of the trust, no actual taking of possession. That case is the settled law of the land. Here, as to delay, there was none, either unnecessary or unusual, in taking possession. It would have been inconvenient to convey the goods out of the tavern to another place to be sold; nor does the law require any such removal. As to the omission to limit the time for performing the trust, there appears no semblance of authority for that objection. The law fixes a reasonable time. The possession was sufficient to support trespass: actual possession is not required. Constructive possession is enough. 6 *Bac. Ab.* (*Wilson's Ed.*) 563, is to the very point. Take the whole charge of the court together, and the main principles of the law are laid down correctly.

The opinion of the court was delivered by

TOD, J.—I do not apprehend there was any error in refusing to charge the jury that the deed was fraudulent and void, because it contained no schedule of particulars, nor limitation of time for the execution of the trust: or because it gives a preference of some creditors above others: or because the grantor was in debt at the time of the assignment. No doubt all these were matters proper for consideration: and so the judge told the jury. They were inferences of fact, and from them in some cases and under some circumstances fraud might perhaps be deduced, in other cases not at all. Whether the possession was sufficient to maintain this action of trespass depends upon the question, whether the property vested in the assignees. If the property was theirs, there would, I think, be possession enough to enable them to defend it by this sort of action. But we are all of opinion that the deed of assignment was null and void as against creditors, and fraudulent in law. The deed is absolute upon the face of it. The grantor retained possession. He held and used the property as before: sold and disposed of it as his own. To make such a deed valid in any case the possession must accompany and follow the transfer. The notice to *Stoever* was immaterial, it being only notice of a transaction void and fraudulent by the rules of law. The question here presented seems put beyond all argument. It is settled, if any principle can be said to be settled by precedents. *Clow v. Woods*, 5 *Serg. & Rawle*, 275. *Cunningham v. Neville*, 10 *Serg. & Rawle*, 201. *Martin v. Mathiot*, 14 *Serg. & Rawle*, 214. *Hamilton v. Russell*, 1 *Cranch*, 313. *Twyne's case*, 3 *Rep.* 80.

Judgment reversed.

[LANCASTER, MAY 27, 1828.]

HIESTER *against* The COMMONWEALTH.

IN ERROR.

A prothonotary who held his office from 1810, to the passing of the act of the 24th of *March*, 1818, is not chargeable to the commonwealth with a tax on the fees received by him after the latter date, for services rendered while he held his office.

An act taxing a public officer, is not to be construed retrospectively, if its language in that respect be doubtful.

WRIT of error to the Court of Common Pleas of *Dauphin* county, where judgment was rendered in favour of the commonwealth against the defendant below and plaintiff in error, *Gabriel Hiester*, upon a case stated for the opinion of the court, with a right to take out a writ of error. The case came into the court below on an appeal by the defendant below from a settlement by the auditor general.

Gabriel Hiester, jr., on the 13th day of *January*, 1809, was appointed and commissioned prothonotary of the Court of Common Pleas, clerk of the Court of Quarter Sessions, and clerk of the Court of Oyer and Terminer for the county of *Berks*, and continued to hold the said offices until the 1st day of *April*, 1818. During the time he held the said offices, he settled his accounts regularly with the commonwealth, and paid over into the state treasury fifty per cent. each year, upon all the fees which he received above the sum of fifteen hundred dollars.

Since the 1st day of *April*, 1818, when he ceased to hold these offices, he received the sum of five thousand nine hundred and thirty dollars and twenty-five cents: [prout the accounts settled by the auditor general hereto annexed, and made part of the case.] This sum is composed of fees of office for services rendered by him whilst he held the said offices, and before the 24th day of *March*, 1818, but which were not received by him until after he ceased to hold them.

If the court should be of opinion that the said *G. Hiester* is under a legal obligation to pay into the treasury of this commonwealth, fifty per cent. upon the fees so by him received after he ceased to hold all or any of the said offices, (after first deducting twenty-seven dollars and eighteen cents to make up a deficiency in the year 1811, and also the sum of one hundred and eighty-four dollars and four and a half cents, received from *John Adams, Esq.*, and twice charged by mistake,) then judgment to be entered in favour of the commonwealth for two thousand eight hundred and fifty-nine dollars and fifty-one and a quarter cents.

If the court should be of opinion that the said *G. Hiester* is under a legal obligation to pay into the treasury of the common-

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wealth fifty per cent. upon the fees so by him received after he ceased to hold all or any of the said offices, after deducting from the sum which he received in each year subsequently to the time when he went out of office, fifteen hundred dollars, then judgment to be entered for the commonwealth for seven hundred and seventy-six dollars and seventy-seven cents.

And, if the court should be of opinion, that the said *G. Hiester* is not under a legal obligation to pay into the treasury of the commonwealth, any portion of the said fees so by him received after he ceased to hold any of the said offices, then judgment is to be entered in favour of the defendant. It is hereby understood and agreed, that if the court shall render judgment for the commonwealth on any one of the foregoing points, it shall exclude the others.

Account of the Commonwealth of *Pennsylvania* against the defendant.

Dr. Gabriel Heister, late prothonotary, &c., of *Berks* county, in account with the Commonwealth for surplus fees.

Fees received up to 1st of <i>October</i> , 1819, No. 1,	\$555,74½
Ditto. - - to 1st of <i>October</i> , 1820, No. 2,	\$305,19½
Ditto. - - to 27th of <i>July</i> , 1821, No. 3,	\$286,13

1821,

<i>October</i> , 13th, do. of <i>John Adams</i> , Esq., per receipt, No. 4, - - - - -	\$42,93½
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Fees settled with <i>George Marks</i> , Esq., former sheriff of <i>Berks</i> county, as per answer to interrogatories, No. 5, - - - - -	\$400,29
Do. <i>Daniel Kerper</i> , Esq., do. per do. -	\$1200,00
Do. <i>Peter Aurand</i> , Esq., do. per do. -	\$2653,25
Do. collected for <i>Peter Aurand</i> , Esq., late sheriff, per No. 6, - - - - -	\$486,71
	<hr/>
	\$5930,25½

Deduct for deficiency in the year ending on the 1st of <i>October</i> , 1811, No. 7, - - -	\$27,18
	<hr/>
	\$5903,07½

Of which he is entitled to retain fifty per cent., agreeably to the act of the 24th of <i>March</i> , 1818, - - - - -	\$2951,53½
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Tax due the commonwealth, - - - - -	\$2951,53½
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Settled and entered,
James Duncan.
 Auditor General's Office.
May 1st, 1824.

Approved and entered.
William Clark,
 Treasury Office,
May 1st, 1824.

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The court below gave the following opinion:—

By the act of the 10th of *March*, 1810, it was the intention of the legislature to tax the officers; and, although no provision was made in that act relative to the taxation of fees received by a person after he went out of office, I conceive that the general powers incident to the office of the auditor general, would be sufficient for the purpose, independent of any such provision. But the act of the 24th of *March*, 1818, places this matter in such a light as to remove every difficulty. The defendant was in office when this act passed; all its provisions embrace him, and he is liable to account for all fees received by him after he went out of office, in the same manner that he would have been obliged to account had he remained in office. I therefore decide upon the first point in favour of the commonwealth, and direct judgment to be entered against the defendant for two thousand eight hundred and fifty-nine dollars, and fifty-one cents.

Buchanan, for the plaintiff in error, contended,—

1. That previous to the act of 1818, prothonotaries were not subject to be taxed:

2. That the act does not embrace the present case.

No tax can be imposed but in plain terms. Taxation is the highest attribute of power, and it must be exercised unequivocally. In acts previous to 1818, there is a broad line of distinction between officers in and out of office. The legislature itself supposed the present a *casus omissus*, else why provide for it particularly. He cited *Charles, Administrator, v. Good*, 11 *Serg. & Rawle*, 247. *Lyon v. McManus*, 4 *Binn.* 169.

The first act is that of the 7th of *December*, 1801, 5 *Pennsylvania Laws*, (by *Thompson*,) p. 3, taxing the clerk of the Supreme Court. The first section expressly respects the officer while holding the office. *Act of the 24th of February*, 1806, 4 *Smith L.* 278, *sect.* 27, is the first general act on the subject. The act is confined to the period of official tenure in express terms.

The act of the 21st of *March*, 1806, 7 *Sm. L.* 547, has little relation to the subject.

The act of the 10th of *March*, 1810, 5 *Sm. L.* 105, is the material one, and the question will depend on the construction of this act. The legislature had had the experience of nine years, under the act of 1801, and no officer was called to account for monies received after he retired. The legislature acted with this before them.

The fees of existing prothonotaries will come into the hands of their successors, and to effect what is contended for, would require them to keep an account: the past officers do not keep such lists. But the penalty for not returning an account, is *removal from office*. Does not this conclusively point the provisions of the law to officers in office?

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The act of 1818, *Pamph. L. 300, Purd. Dig. 608, 609*, is a clear legislative construction of preceding acts.

It is said this construction would offer facilities to fraud. What of that?—It is the business of courts to construe, not to supply the defects of laws. But, if the officer fraudulently kept fees outstanding, he would be chargeable for them as if actually received. But the officer could not prevent the fees from coming to hand—they are collected by the parties on execution, and the parties take care to have payments of costs noted on the docket.

2. The act of 1818, does not embrace this case. Retrospective acts are abhorrent to the principles of justice. *Dash v. Vanslick*, 7 *Johns.* 501. *Alexander v. Richard*, 14 *Serg. & Rawle*, 216. 6 *Bac. Abr.* 370. The construction is to be against retro-active operation. But all the provisions of that act are prospective. The act of 1818, was not to operate till after there should be a resignation or removal of the *existing* officers at its passage.

To carry this back, all settled accounts previously would have to be opened, where one thousand five hundred dollars had not been received during the period of actual tenure. He also insisted that the accountant would be entitled to fifteen hundred dollars a year after going out of office.

Harris, contra.—By the act of 1810, he is to be allowed for deficiency when in office, out of the fees to be recovered afterwards: why then allow him a part, if entitled to the whole? But the case depends mainly on the act of 1818. It is not *ex post facto*. The constitutional provision relates to criminal laws. 3 *Dall.* 386. *Somerset Turnpike Company v. Ogle*, 13 *Serg. & Rawle*, 256. To allow fifteen hundred a year after retirement, would defeat the law, because fifteen hundred a year is not received in any county.

Douglass, same side.—The commonwealth may tax fees earned as well as those to be earned hereafter. The act of 1810 gives fifteen hundred dollars, and divides the surplus, no matter when received. *The Commonwealth v. Lewis*, 6 *Binn.* 274.

Buchanan, in reply, referred to 7 *Johns.* 501.

The opinion of the court was delivered by

GIBSON, C. J.—The notion of a tax on fees was first put in practice in 1801, when the legislature laid a tax on fees received by the prothonotary of the Supreme Court, first deducting two thousand dollars which were allowed him clear of tax. In 1806, the sum to be deducted was increased to two thousand five hundred dollars, without, however, changing the principle of accountability which embraced fees received only while in office. In the same year, and with the same limitation, the legislature laid a tax on the fees received by the prothonotaries or clerks of each of the courts in the Commonwealth. These acts were repealed and supplied by the act of 1810, which, as it is one of the two on which the question depends, merits a particular examination. It provides

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that the officer shall keep an account of all fees received in his office, and annually thereafter furnish the auditor general with a copy; and whenever the amount shall exceed the sum of fifteen hundred dollars, the auditor general shall charge the accountant fifty *per cent.* on the amount of such excess. In this there is certainly no express change of the principle of accountability, the provisions being exclusively applicable to persons in office.

The argument on the part of the commonwealth is, that the object was to give the officer a salary which should not exceed fifteen hundred dollars without being subject to the tax, rendering him accountable for the excess without regard to the time when received. But this construction is attended with the absurdity of allowing a salary to a person who has rendered no services. Those who are subject to the mandatory parts of the act, must necessarily be entitled to the benefit of such provisions as are favourable; and an officer out of place, would be entitled to the same allowance as if he were still in office. This consequence would be inevitable; and it is therefore reasonable to presume that the notion of a salary was not entertained. The truth is, the fees supposed to be received by officers out of place were not deemed worthy of attention. This seems the more probable by considering that the act of 1810 is in terms like the preceding acts; and, under these, the practice of requiring none but the existing officers to account, was notorious. With this practice before their eyes, it is fair to presume, the legislature would have introduced a change of provision had a change of the practice been meditated. There is every reason to think that the act of 1818, by which the principle of accountability has been entirely changed, was passed in consequence of the attention of the legislature having been awakened to the importance of the subject, by certain accounts which, it appeared in the argument, were voluntarily submitted to the auditor general by displaced officers who thought themselves bound by the construction proposed on the part of the commonwealth. However this may be, the passing of that act is a legislative recognition of the construction contended for by the plaintiff in error.

If, then, both the letter and the intention accord with that construction, by what authority shall we declare the meaning of the legislature to have been otherwise? Granting that the legislature would, in 1810, have enacted the same provisions that they did in 1818, had they been apprized of the true state of things that then existed, yet they have not done so; and for us to supply what we might suppose a deficiency, would be an act of judicial legislation of the worst sort, because not only judicial but retrospective. Taxation is an act of power, not to be extended by implication; the more particularly in a case like the present, where the burden is laid not on the public, but on a particular class.

The case, however, is said to be within the purview of the act of 1818. By that act, it is made the duty of the successor of any

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displaced officer who shall pay over surplus fees to his predecessor, to take duplicate receipts and transmit one of them to the auditor general, with a statement of such fees; and the auditor general is required to settle the account, charging the late officer with such proportion as would have been paid to the commonwealth had he remained in office. How this act can, without violence, be applied to transactions that were finished when it was passed, I cannot discover. Its provisions are adapted to cases where the existing officer shall have taken duplicate receipts and transmitted one of them, together with a statement of the account, to the auditor general; which surely cannot be predicated of transactions long past, without those things having been done. The act, as it seems to me, is plainly prospective in all its parts. But if that were even doubtful, we ought to avoid a construction that would give it a retrospective effect. It is said it would operate only on fees not then received; and that to tax a debt due like any other species of property would be perfectly constitutional. So would it be to tax the dollars in the officer's pocket. But this is no answer to the objection, that to bring the act to bear on fees which were earned when it was passed, would give it a retrospective effect. The officer accepted the office under a law which allowed him all surplus fees received when not in office; and for the commonwealth to share them with him in the form of a tax, would deprive him of what the law had guaranteed to him as his property. In this way every invasion of the right of property might be justified. But by the constitution, private property is not to be taken for public use without making compensation; and we are bound to construe a law of doubtful meaning so as not to impinge on either the letter or spirit of the constitution. As a law of prospective operation, the act is, on the other hand, founded not only in the principles of the constitution, but of the most severe morality. Where the office is taken with an assurance that the emoluments are in fact what they seem, the officer cannot complain that the compensation is inadequate to the services. But, to decrease the compensation after it had been earned, would be palpably unjust. The authorities cited prove beyond contradiction, that a law which is not peremptory, ought not to be so construed as to impair vested rights. Here, however, instead of affecting the right to fees then earned, the provisions of the act point a different way; and I am perfectly satisfied the construction put on these laws by the court below cannot be sustained.

*HUSTON, J.—The following acts of assembly were referred to as material in this case:—

The act of the 24th *February*, 1806, sect. 27. The prothonotaries or clerks of the Supreme Court, and prothonotaries or clerks of the several courts of Quarter Sessions of the peace and Common Pleas within this commonwealth, shall annually furnish to the re-

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gister and comptroller general an accurate account of the fees received in each of their offices, respectively, in the manner prescribed by the act above cited; and of the amount of fees received during each year by each of the prothonotaries, respectively, as aforesaid: fifteen hundred dollars shall be and remain clear of tax, and the residue thereof shall be taxed and accounted for agreeably to the provisions of the aforesaid act.

The act of the 10th of *March*, 1810, after enumerating several offices, says, they shall from and after the first day of *October* next, keep or cause to be kept a fair and accurate account of all the fees received for services performed by them, or any person employed by them, in their respective offices; and shall annually thereafter furnish a copy of such account upon oath or affirmation to the auditor general, who shall proceed to examine the account so furnished by the officers aforesaid: and whenever the amount of any accounts shall exceed the sum of fifteen hundred dollars, the auditor general shall charge the said officers, respectively, fifty *per cent.* on the amount of such excess; which sum, so charged, shall be paid by them into the treasury for the use of the commonwealth. A neglect to comply with these provisions is made a misdemeanor, and the governor shall remove such officer from office. And the auditor general shall have the same power to compel the said officers, respectively, to furnish their accounts for settlement, and to compel the payment thereof, as he has in other cases.

On the 30th of *March*, 1811, was passed an act to amend and consolidate the several acts relating to the settlement of public accounts, and the payment of public monies, and for other purposes. This act gives the auditor general very extensive powers over bodies corporate, officers, and other persons interested with the receipt, or who may have received, or shall hereafter *become possessed of public money*. And throughout the general clauses, officers and other persons who have become possessed of public monies, are put equally within his power. In the seventeenth and following sections, treasurers, brigade inspectors, sheriffs, auctioneers, and secretaries of the commonwealth are each directed to furnish accounts at stated times annually: and yet there is no express provision authorizing the auditor general to compel settlement and payment after any of those officers have gone out of office. Under the general expressions, though, of persons in the receipt of, or possession of public monies, they have universally been cited and compelled to settle and pay, after having gone out of office.

On the 24th of *March*, 1818, was passed a supplement to the act taxing certain offices. It provides that in case of the death or removal from office of any officer, who by law is accountable to the commonwealth for certain surplus fees of office, it shall be the duty of his successor or successors in office, who from time to time may receive and pay over such fees to his predecessor in office, to take duplicate receipts for the same, and transmit one of those receipts

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to the auditor general, together with a statement of such fees as may otherwise be received by such predecessor from time to time, as far as he may be able to ascertain the same. And it shall be the duty of the auditor general from time to time to settle the accounts of the late officer to whom such fees shall have been paid, and compel him to account upon oath or affirmation, and to pay over such proportion of the arrearages of fees so received by him, as would have been paid to the commonwealth had he remained in office, allowing to such officer in case of deficiency in any year while he shall have held his office, such sum as shall make up the whole sum he would have been entitled to have retained free from any tax thereon.

This last has in the argument been called a retrospective law, and of course made the subject of much censure. I do not consider it retrospective. It assumes that these officers are liable for fees received after being out of office, for services performed during their continuance in office; and prescribes an additional mode of procuring evidence of the amount so received.

This case presents four several points for the consideration of the court, and every one of them is important in case the preceding one is decided against the commonwealth.

I am of opinion the first was decided rightly in the Common Pleas. The real construction of the three first acts is, that the fees are to be considered received at the time they are earned. If, however, any part of them cannot be recovered, the officer is not chargeable with such part. This was the contemporaneous construction: so accounts were settled in 1812, of officers who had gone out of office before 1810, (though, in another respect, I think a palpably erroneous principle was adopted in these settlements.) Taking the whole of the acts together, the officer is to be allowed fifteen hundred dollars a year, during the whole time he is in office, and the commonwealth is entitled to fifty *per cent.* of the overplus, to be paid whenever received, no matter whether actually received during the continuance of the office or after.

The construction contended for by the plaintiff in error, goes to defeat the act entirely, by taking care not to receive any more than fifteen hundred dollars within the year, and leaving all the rest in the hands of the sheriff, or of the defendant, and taking a bond or note for it: an officer, in a large county, may make a provision for himself for many years to come. If the officer, for the time being, retains fifteen hundred dollars, and the officer who has been removed retains fifteen hundred dollars out of fees due, but not collected till he is out of office, there may be two several sums of fifteen hundred dollars retained from fees received for the same office, in the same county, for the same year, than which nothing could be more contrary to the law.

If bonds or notes can be taken from sheriff, or from defendant, on leaving the fees in their hands, no money will ever come into

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the treasury from a tax on officers hereafter. Such construction ought never to be put on any statute as will entirely defeat its object, or as will leave it effective against one person, but put it in the power of another totally to evade its provisions, and rewards him for doing so.

But it is said none of the three first acts speak of or contemplate money to be received from an ex-officer. I have, in part, given my opinion on that point, that the legislature considered the fees as not only due and payable, but as actually paid within the year: and, in point of fact, every thing, except continuances and other docket entries, were paid at the time the service was performed, to the prothonotary of the Supreme Court, who was first taxed. But I have another answer: we have many acts directing public officers to account for monies; county treasurers, sheriffs, auctioneers, the secretary of land office, the surveyor general, &c. The laws, in all cases, express that their accounts shall be settled annually, quarterly, &c., and while the several officers are in office. Yet, from the origin of our government, those who have public monies have been compelled to settle and pay after going out of office; and the act of the 30th of March, 1811, 5 *Smith*, 228, expressly authorizes the auditor general to call to account all persons in the receipt or possession of public monies, and gives very ample powers to the auditor general and treasurer, not only to compel settlements, but payment; and neither the law nor the practice under it, has ever discriminated between a defaulter still in office, or one who has gone out of office. And I cannot discover any reason for a distinction in favour of the latter.

In my opinion, the decision ought to have been for the commonwealth, on each of the points, and that the judgment ought to have been affirmed.

TOD, J. concurred with HUSTON, J.

ROGERS and SMITH, Js., concurred with the Chief Justice.

Judgment reversed, and judgment on the case stated rendered for the defendant below.

[LANCASTER, MAY 27, 1828.]

STERLING *against* RITCHEY and another.

APPEAL.

A judgment for want of affidavit of defence, taken under the old rules of the Circuit Court before their formal re-adoption, the defendants' attorney, not knowing the ancient rules, opened on affidavit of defence afterwards filed.

APPEAL from the Circuit Court.

Summons in debt in the Court of Common Pleas of *Dauphin*

(*Sterling v. Ritchey*, and another.)

county, not exceeding sixteen hundred dollars, to *August* term, 1826, and statement filed. The cause was removed, by the defendants, to the Circuit Court of the county of *Dauphin*, *December* term, 1826. On the 10th of *September*, 1827, the plaintiff entered judgment for want of an affidavit of defence, which the Circuit Court refused to open, and the defendants appealed to this court.

M^r Clure, for the appellant.—The defendants' counsel was ignorant of the rule, and therefore it is a case of surprise, against which the court will relieve. The situation of the bar was peculiar. No rules were adopted. The rule under which judgment was entered was adopted, by particular counsel, in 1795; but it was only in force between those who were parties to the agreement by which it was established. *Vanatta v. Henderson*, 3 *Binn.* 417. This is an application to the discretion of the court. We do not object to the judgment standing as a security.

Elder, contra.—The rule was made formally and originally by the court. The judgment is within the very letter of the rule. In the Common Pleas, where the action was brought, there is just such a rule.

M^r Clure, in reply.

The opinion of the court was delivered by

GIBSON, C. J.—The Circuit Court system was restored after having been out of use for nearly twenty years; and few remain at the bar who are familiar with its rules of practice; and some of the judges of this court entertained more than a doubt whether those rules were *ipso facto* restored along with the court. It was, however, necessary to adopt some practice as to pleading and noticing causes for trial, and those rules were referred to, it would seem, by common consent, as furnishing a guide. But the doubts which were entertained, rendered it necessary for this court to act on the subject; and the old rules were accordingly adopted, with a few trifling alterations, in *October* last, a short time after the judgment in this case was signed for want of an affidavit of defence. It is obvious; therefore, that it is a case of peculiar hardship. By making now the affidavit which the rule required to be made then, the defendant has removed all suspicion of trifling or backwardness; and the attorney testifies that a want of compliance with the rule was occasioned by an ignorance of its existence. A court ought not to enforce its rules so rigidly as to produce injustice; and we are satisfied that the peculiar circumstances of the case entitle the appellant to relief.

Judgment of the Circuit Court opened so far as to let the defendant into a defence, but to stand as a security for what may be found due.

[LANCASTER, MAY 27, 1828.]

UHLAND *against* UHLAND.

IN ERROR.

A minor having an interest in land in common with adults, A. takes a deed from the latter, and agrees to hold a part of the purchase money in his hands for the use of the minor, it being understood the minor might or might not take the money when he came of age, and A. enters into possession and enjoys the land, and sells part; four years after coming of age the minor tenders a deed and demands the money: *held*, that an action lies by the minor against A. on the promise.

The minor need not tender a deed containing a covenant of general warranty.

From what time interest shall be computed, in such case, is for the jury under the particular circumstances.

ERROR to the Court of Common Pleas of *Lebanon* county.

Weidner and *Fisher*, for the plaintiff in error.

Elder and *Norris*, *contra*.

The opinion of the court was delivered by

SMITH, J.—*George Uhland*, the defendant in error, who was the plaintiff below, brought an action of *assumpsit* against *John Uhland*, the plaintiff in error, in the Court of Common Pleas of *Lebanon* county, under the statement law, as it is called, of 1806, to recover one hundred pounds, with interest thereon from the 26th of *May*, 1810. On the trial of the cause, the circumstances which gave rise to the suit appeared from the evidence to be the following:—

On the 24th of *October*, 1795, a certain *Martin Light*, of the county of *Dauphin*, conveyed to *George Uhland*, the father of the parties in this suit, and to *Maria* his wife, (a daughter of the said *Martin Light*,) “and to the survivor of them, and after their decease to the heirs of the body of the said *Maria* by the said *George Uhland*, and to their heirs and assigns,” two hundred acres of land, in *Hanover* township, in the county of *Dauphin*, (now *Lebanon*,) for and in consideration of one thousand pounds. After the delivery of this deed, *George Uhland*, one of the grantees died, probably about the year 1800, leaving his wife *Maria*, and issue six children, one of whom, a daughter, had been married to *Henry Hershberger*, but had also died leaving three children, who stood in the place of their deceased mother, *Ann Hershberger*. At the time *George Uhland* died, his estate was indebted to the estate of *Martin Light*, deceased, in the sum of three hundred pounds, a debt due from him to his father-in-law, *Martin Light*, for the land, mentioned in the deed of 1795. About the year 1810, the executors of *Martin Light* were pressing the estate of *George Uhland*

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for the payment of this debt, in consequence of which the widow, *Maria Uhland*, proposed that *John Uhland*, her son, should purchase one hundred acres of the land mentioned in the deed of 1795, for nine hundred pounds. To this proposal *John* and the other heirs, then of age, assented; and on the 26th of *May*, 1810, a deed for the one hundred acres, by metes and bounds, was accordingly made by *Maria Uhland*, the widow, and by three heirs of *George Uhland*, deceased, to *John Uhland*, the plaintiff in error. *George Uhland* was at this time a minor, and no one had been appointed to take care of him or his estate. In this last mentioned deed of 1810, it is recited, that "whereas *George Uhland* the elder was then dead, and the said *Maria Uhland*, his widow, desirous and willing to give up unto her son, *John Uhland*, part of the premises, conveyed to her for life by her father, *Martin Light*, by deed of the 24th of *October*, 1795, and had mutually agreed so, and had surveyed off the said one hundred acres by metes and bounds, and for which one hundred acres the said *John Uhland* had agreed to pay nine hundred pounds, in the following manner:—three hundred pounds thereof to the executors of *Martin Light*, it being a debt due to the said *Martin Light* by *George Uhland*, in his lifetime; one hundred pounds to be retained by the said *John Uhland* for his share in the said one hundred acres: and, further, to pay to each of his brothers and sisters, or their legal representatives, one hundred pounds each; and that the remaining two hundred pounds the said *John Uhland* should retain in his hands for the use of his brother *George Uhland*, then a minor, and for the children of his deceased sister *Ann*, who had been intermarried with *Henry Hershberger*." The deed then proceeds in the usual form, and states the one hundred acres conveyed, "to be subject, nevertheless, to the payment of the said three hundred pounds due and payable to the executors of *Martin Light*, deceased, and also subject to the claims of the said *George Uhland*, who is yet a minor, and the minor children of the said *Ann Hershberger*, deceased," concluding with the usual covenants and a special warranty. The two hundred acres had been, since the death of old *George Uhland*, to this time, in the possession of *Maria Uhland*. *John Uhland* accepted this deed, took possession of the one hundred acres, used and enjoyed them, sold five acres thereof to a certain *Philip Seltzer* for two hundred pounds, and cleared part of the land, and for the wood sold from one acre received forty-five dollars. It was also proved, that at this time, it was understood between the parties to the deed, that *George Uhland* might or might not take the one hundred pounds when he should become of age. *George Uhland* became of age in *May*, 1819; and on the 13th of *November*, 1823, tendered a deed, dated the 8th of *November*, 1823, duly executed, to *John Uhland* for his part of the one hundred acres, and then demanded the payment of the said one hundred pounds, and of the interest thereon from the 26th of *May*, 1810; which deed was not

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accepted by *John Uhland*, nor the money paid to *George Uhland*. *John Uhland* had paid, before this time, to the other heirs, and to the three children of his deceased sister, *Ann Hersherberger*, their one hundred pounds, respectively. Upon the trial a verdict was rendered for the plaintiff, for four hundred and eighty-four dollars and ninety-six cents, and judgment thereon, on the 11th of *November*, 1825. Various propositions were presented by the defendant for the answers of the court, which need not be all mentioned now, inasmuch as some of them were answered favourably for him. In one of them the court was requested to charge the jury, that the deed of the 26th of *May*, 1810, from *Maria Uhland* and the three heirs to *John Uhland*, the release of the 8th of *November*, 1823, from *George* to *John Uhland*, and the parol testimony given in the cause, formed no contract on which an action of *assumpsit* could be supported: and that if any contract could arise under the deed of the 26th of *May*, 1810, the proper action would be either *debt* or *covenant*, and not *assumpsit*. The answer of the court to this proposition was, "That in the deed of *May*, 1810, there was an agreement by the contracting parties to that deed, that one hundred pounds should be retained by *John Uhland* for *George Uhland*, then a minor, and that parol evidence had been given, that it was the understanding of the contracting parties at the time of the execution of the deed, that the one hundred pounds should be paid by *John Uhland* to his brother *George Uhland* after he should become of age, if *George* would then agree to accept it for his share in the estate. And that this was a sufficient foundation for an action of *indebitatus assumpsit* by *George Uhland* on that contract or agreement, provided he had not abandoned his right to sue by neglecting for an unreasonable time to tender a conveyance of his right to the land, to *John*, and making a demand of the money." The court further stated, "that under the deed *John Uhland* took possession of the one hundred acres, which he retains ever since, cut down part of the timber, sold it, and had sold five acres of the timber-land, and that his vendee paid him two hundred pounds for the same, and cut off the timber, and that this was a sufficient consideration in law for *George* to support this action, provided, as already stated, he had not abandoned his right to demand the one hundred pounds from *John*, which he had agreed to retain for his use, when he received the conveyance from the widow and the other parties to the deed." This is assigned as error, and it is contended that the facts proved in this case were not a sufficient consideration in law to entitle the plaintiff, *George Uhland*, to recover. I cannot discover any error in the answer of the court to this proposition. The consideration for the promise made by *John* in the deed was sufficient; he received for it a title from his mother of her right to the one hundred acres; he received the title of the three heirs, who were then of age; he obtained the possession of the one hundred acres, as well of the part belonging to *George* as of that

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part belonging to the other heirs; he occupied and used the land, cleared a part, sold a part for a high price, and to this day exercises every possible act of ownership, undisturbed over the same; he has paid *all* the other heirs: in short, he and all the parties lived, and do live up to the agreement, except that he refuses to pay *George* his one hundred pounds. It appears that the mother is living, and of course, if it were not for this deed, in which he had made the promise to pay *George* the one hundred pounds, he could not now have the absolute possession of the land, since his mother would have a life estate in the whole tract, of which these one hundred acres are a part. Shall it then be said, there was no consideration for this promise? There was a consideration, and such a one as may well support this action. *George Uhland* could not, as it is contended, bring an action of debt or of covenant against *John Uhland* on this deed, for this plain reason, that he was no party to it. When a deed is made *inter partes*, that is, between A. of the first part, and B. of the second part, C. a stranger, cannot sue on a covenant therein, though made for his benefit; but where it is *not made inter partes* he may sue. So where a bond was made to A. for the benefit of B., it was held B. could neither sue upon it, nor release it, he not being a party to it. 1 *Lev.* 235. And whatever diversity of opinion and decisions there may be among the older cases, in respect to the right of a third person to sue upon a promise made to another for his benefit, it seems to be now settled, and is so laid down by Justice BULLER, "that if one person makes a promise to another for the benefit of a third, that third may maintain an action upon it." So in this case, under all the circumstances, *George Uhland* might well sustain this action against his brother on the promise made to his mother for his benefit; and especially in this state, under the statement law, under which he has proceeded. There is then no error in the answer of the court to this point. It is not necessary to consider the third and fifth errors assigned.

The court was also requested to charge the jury, that if *George Uhland* considered himself entitled to the one hundred pounds from *John*, he was bound to convey his interest to him, when he arrived at full age, and that his not tendering a deed to *John* for four years and six months after he was of age, rescinded the contract; "that the interest of *George Uhland* in the land did not pass by the deed of *May*, 1810; and, that before he would be entitled to demand the one hundred pounds from *John Uhland*, he would be required by law to tender to *John* a conveyance of his title in a reasonable time after he arrived at full age; and that his delaying to tender a deed to *John Uhland* for upwards of four years and six months after he become of age, was an unreasonable time, and would bar his recovery of the money, unless satisfactorily accounted for and explained." I cannot see on what ground the defendant has a right to complain of this answer as erroneous. The answer, under the circumstances of this case, was as favourable to the defendant

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as he could have desired it to be. It does not appear, that when the deed was tendered to *John*, and the money demanded on the 13th of *November*, 1823, that he made any objection on account of the delay in tendering the title; he did not say it was too late, nor did he refuse to accept the deed or to pay the money for any such reason, nor does it appear that he ever demanded a conveyance from his brother *George*, or desired him to make his election; for *George Uhland*, being an infant at the time the promise was made by *John*, had a right to elect, after he had arrived at twenty-one years of age, either to have his money or his share of the land:—he did elect, he demanded his money, and as *John* had paid the other heirs, why should he not pay *George*? Equity, conscience, reason, and justice, all say he ought to be paid. These brothers lived near each other,—no doubt saw each other often, and as *John* had paid the three hundred pounds to *Light's* executors, had paid each of his sisters their respective shares, and to the children of his sister *Ann* their one hundred pounds, it was reasonable for *George* to expect that his brother *John* would eventually do justice to him and pay him according to his promise. This may have been an inducement to delay the tender of the deed; but be that as it may, the answer of the court was fairly and legally placed before the jury, and the defendant cannot complain, for I repeat, it was as favourable to him as it ought to have been.

As to the errors assigned in regard to the title of *George Uhland*, that he was bound to tender a deed conveying his right in the estate, *with a general warranty*, this court is of the opinion, that by the deed of 1795, a good and sufficient title in fee vested in *George Uhland*, and that he having tendered to *John* a deed, in which he conveyed all his right in the one hundred acres, he complied with all the law required of him in such a case, and that it was not incumbent on him to tender a deed, containing a general warranty. Indeed, it does not appear, that *John Uhland* ever demanded such a deed from his sisters, or any of the other children or their representatives, nor even from *George* himself; nor did he stipulate for a deed with a general warranty, at the time the agreement was entered into.

After the court had charged the jury on all points on which they had been requested to do so by the defendant, the counsel for the defendant requested the court to instruct him *as to the time* from which interest ought to be charged; to which request, the court answered, that in this case, *that* was a matter for the consideration of the jury and it was for them to fix the time: this answer is the last error assigned.

The law is well established, that one who receives money of another, and holds it against his consent, shall pay interest; and, where one retains money of another unlawfully and against his consent, or after demand, interest shall be allowed. There may be cases in which one ought to pay the principal only; and there may be cases

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in which one ought, *ex equo et bono*, to pay the principal with interest. A simple calculation will show, that the jury did not give interest from the 26th of *November*, 1810, (the time of entering into the agreement,) to the 18th of *November*, 1825, (the time of trial,) for if they had, the verdict must have been for more; so that the defendant has no reason to complain on this account: but, when it is considered, that *John Uhland* quietly took possession of the one hundred acres in *May*, 1810, and holds the undisturbed possession thereof since, used and enjoyed and received the profits of the lands, that he lost no opportunity of making an advantageous sale thereof, and that there was no evidence of his having kept the money lying dead for one moment, or ever had made a tender of it to *George* or to any one for him, I cannot see on what reasonable ground he can ask an exemption from the payment of interest; indeed the defendant indirectly admits, he ought to pay interest: all he complains of is, that it ought not to have been left to the jury to say from what period it should commence. But as the defendant delayed the payment of one hundred pounds improperly, and therefore is chargeable with interest, and as there are, in this case, peculiar circumstances, the matter of interest was properly left to the jury. In a case too, circumstanced like the present, where the defendant did not offer to pay the money, but actually refused to pay it, when demanded, I think, a court would be justified in leaving it to the jury to say, what sum should be paid by way of interest, and from what time it should commence. I am of the opinion, that the interest here depends on considerations of justice and equity arising out of the peculiar circumstances disclosed at the trial, and that it was for the discretion of the jury to determine from *what time* interest should be recovered. The court then, on this part of the case, also charged correctly. Upon the whole, I am of opinion, that the judgment of the Court of Common Pleas should be affirmed.

GIBSON, C. J.—Whether this be considered as an action at law for purchase money or a bill for specific performance, the principles by which the rights of the parties are to be determined, are necessarily the same. In an action for purchase money, even a court of law will take cognisance of equitable objections, (*Sugd. Vend.* 1st *Am.* edit. 160,) and *a fortiori* we will do so here, where there is no separate court of equity in which a purchaser may find protection. The question then is, whether equity would decree this contract specifically.

It seems to be no objection that the agreement is unequal, or founded in mistake, or on a consideration remote. But it is essential that it be *mutual*, and afford *reciprocal remedies*. Were it not for this familiar elementary principle, a party would be in the predicament of being held to the bargain where it should be prejudicial to him, without the correlative right of enforcing it where

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beneficial. That both shall be bound, is a tacit condition of every agreement; for the law presumes what is true in fact, that no one would do an act of such consummate folly as to bind himself in every event, while the other party should be at liberty to abide by the bargain or not, at his option; and the mutual mistake of the parties on this head, as on any other, furnishes either, with an unanswerable argument for rescinding the contract. In this respect, as in every other, equality is equity. It seems, however, to be sufficient if this mutuality of contract and reciprocity of remedy exist when the agreement is made. *Stapelton v. Stapelton*, (1 *Atk.* 10.) But if it do not exist then, it is not easy to see how, without a new consideration, it can acquire an existence afterwards. To the rule, as I have stated it, there are but two exceptions: the first founded on the statute of frauds, which requires the agreement to be signed only by the party to be charged; and hence it has been thought, although not universally, that the one party may be charged even though the other cannot: and the second, occurring where the agreement could not be obligatory on the party enforcing it, in consequence of fraud in the concoction of it by the party sought to be charged, who would profit by his own wrong were he permitted to elude the contract by setting up a want of mutuality occasioned by his own knavery. (*Newl. on Cont.* 152, 157.) It is not pretended that the case is within either of these exceptions; and how does it stand under the rule? A mother having an estate for life, with remainder in fee to her two sons, three married daughters, and three grandchildren, the issue of a deceased daughter, joins with the daughters and their husbands in a conveyance in fee to one of the sons, (*John*), for the consideration of nine hundred pounds, to be paid thus: three hundred pounds to the person from whom the family acquired the estate, being part of the purchase money; one hundred pounds to each of the daughters: one hundred pounds to be retained by the grantee for his own share; and the remaining two hundred pounds, also, to be retained, as it is expressed in the conveyance, "for the use of his brother *George*," (the plaintiff below,) "who is yet a minor, and the children of his sister *Anne*:" *Hubendum* "subject to the claims of the said *George Uhland* and the minor children of the said *Anne*." This is an exact statement of the case; from which it is apparent, the mother surrendered her life estate for the equal benefit of her offspring; and that the daughters with their husbands, as far as they could effect it, vested the title to the whole in *John*, receiving for their interest an equivalent in money. But they could not, and it is evident did not mean to, contract for those who were not, and from their infancy could not be, parties. The two hundred pounds were to be retained for *George* and the children of *Anne*, not absolutely, but in the event of their acceding to the family arrangement as soon as they should have capacity to do so. But the mother and sisters did not pretend to reserve for them a *right* of accession: that was necessarily to be sub-

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ject to future arrangement. But what if *John* should object? The mother would in that event be entitled to resume that part of the life estate which she had surrendered for the benefit of *George* or the children of *Anne* with a view to the contingency of their becoming parties; for the fraudulent refusal of *John* to complete the arrangement in any particular part, would induce a chancellor to declare him a trustee *pro tanto*. But between *John* and *George* there was no contract, unless the mother may be supposed to have represented *George*; and even that would be unavailing, for it will be conceded that she could not have bound him. In *Armiger v. Clarke*, (*Bunb.* 111,) we have the very case. A father, tenant for life, artiled for the sale of the fee at thirty years' value, and received five hundred pounds, which, it appeared by a memorandum on the articles, was to be repaid if the father did not make out a title by a day certain. On a bill to enforce the articles by the son, it appeared in the proofs that the father could not make out a title, the land being in settlement on his wife; the bill was dismissed mainly because *the son would not have been concluded by his father's covenant, and the remedy therefore was NOT MUTUAL*. Here then was a sale by a parent for himself and his child, which was held not to bind the purchaser because it did not bind the child. This is precisely our case, except it does not appear that the child was an infant; and I admit that, in modern times, a doubt has been started whether in respect of contracts directly with the infant, that does not make a difference. But the rule seems to stand clear even of this as an exception. The point was decided in the house of lords as early as 1710, in *Conway v. Shrimpton*, where it was determined expressly that an agreement with an infant is not binding because *ex parte*, (*Rudiments of Law and Equity*, 19, pl. 13:) from which Lord HARCOURT concluded that such an agreement is bad on *both sides*. (1 *Mad. Ch.* 423, note m.) The doubt, however, has been only in respect of agreements directly with the infant, which being only voidable, admit of confirmation on coming of age. But here, as in *Armiger v. Clarke*, there was no agreement with the infant or any one in his stead, an attempt by the mother and sisters to bind him, if such there had been, being simply void, and incapable of confirmation without a new consideration.

There is therefore no covenant on which *George* can maintain an action in any form. The principle of *Dutton v. Poole*, (2 *Lev.* 210,) that an action may be maintained by the person beneficially interested in a promise made to another, has obtained only where the promise was on a consideration executed. And it has been expressly held to be inapplicable to covenants under seal. *Gilby v. Copley*, (3 *Lev.* 139.) In *Salter v. Kingly*, (*Carth.* 77,) Lord HALE held that a party to a deed could not covenant with another who was not a party: and in *Offley v. Ward*, (1 *Lev.* 235,) where a bond was made to A. for the use of B., it was adjudged that B. could neither sue on it nor release it. He could doubtless sue on it in the

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name of the obligee, and his release would be good in equity. But in a suit against *John* in the name of the mother and sisters, want of mutuality would still be an obstacle. *John* was to retain one hundred pounds for the use of *George*, when *George* should convey. But there was no covenant by the mother and sisters that he ever should convey; consequently, there could be no remedy against them or any one else.

Nor do I think the possession taken by *John* under the conveyance, can give *George* an equity. Had he entered on *George's* estate, it might have been otherwise. But he had not acquired the whole remainder, and consequently the mother's life estate did not merge in it. So that no part of the remainder, not even his own share, took effect in possession. He therefore necessarily entered on the life estate which, even yet, is unexpired; and, so far was he from assuming the ownership of *George's* estate, that he disclaimed it by accepting a conveyance in which it was expressly reserved. Thus, the possession was perfectly consistent with the estate of *George*.

The case, then, falls within the rule which stands in the way of specific performance, where the remedy is not mutual. A bill for specific performance is an application to the discretion of the court, (*Sugd. on Vend.* 1st Am. edit. 147:) and it is for this reason a chancellor withholds his extraordinary powers wherever a party claims the unjust advantage of being bound or loose, as his interest may dictate. As, therefore, an action for purchase money is in our courts emphatically a bill in equity, it seems the court below erred in saying that the action might be maintained on the facts given in evidence.

Judgment affirmed.

[LANCASTER, MAY 22, 1828.]

LIGHT *against* LIGHT.

APPEAL.

The Circuit Court has no jurisdiction in the case of a libel for a divorce. In a libel for divorce, if the party fails to give notice of the particulars to be proved under general allegations, he cannot supply the omission at the trial by having the libel amended.

APPEAL from the decision of the Circuit Court in the case of a libel for divorce, by *Barbara Light* late *Barbara Merrett*, by her next friend *Joseph Orth*, against *Martin Light*, filed in the Court of Common Pleas of Lebanon county.

Elder, for the appellants, *Weidman* and *Norris*, contra.

(Light v. Light.)

The opinion of the court was delivered by

ROGERS, J.—The material question in this case is, whether the Circuit Court have jurisdiction in the case of a libel for a divorce.

Barbara Light, by her next friend, exhibited her libel in the Court of Common Pleas of the county of *Lebanon*. An issue directed by that court, was removed into the Circuit Court; and, on the trial before his honour, Judge HUSTON, the plaintiff suffered a nonsuit, which he moved to take off, and, on the motion being refused, he entered his appeal to this court. As a question of practice involving the jurisdiction of the Circuit Court on a subject of so much importance to the parties, and their issue, it is desirable it should not remain in doubt, but be settled without delay. I am pleased, therefore, that we have an opportunity of deciding the point at this early day, and before any mistake may have been made with respect to the power of the court.

By the act regulating divorces, passed the 13th of *March*, 1815, and by the 2nd section of the act, the petition is directed to be exhibited to the judges of the Court of Common Pleas, in term time, or to one of the judges of the court in vacation, who are directed to issue a subpœna, and make preparatory rules, &c., for the trial of the cause.

The seventh section of the act gives the court power, after hearing, to determine the cause, by either dismissing the libel or decreeing a divorce, or separation, or that the marriage is null and void.

And the 13th section provides, that either of the parties, after the final sentence or decree, may appeal to the Supreme Court of the proper district, upon entering into a recognisance before *one of the judges of the Court of Common Pleas*, before whom the cause shall have been tried, with at least one surety, &c. And that the judges of the Supreme Court shall transmit the record with their judgment thereon, &c., to the court below, to be carried into effect.

From these and other sections of the act, (which, it is unnecessary particularly to enumerate,) it is evident that the legislature, by the act of 1815, and its supplements, intended that jurisdiction over cases of divorce should be vested exclusively in the Courts of Common Pleas. To them it committed, in the first instance, this interesting branch of our law, subject to review on appeal, (the mode and manner of which, are particularly pointed out,) to the Supreme Court. The petition is to be exhibited to the Court of Common Pleas, they are to make the preparatory rules, and, after hearing, to decree; and, on a final decree, an appeal lies to the Supreme Court. Bail on the appeal, is directed to be taken by a judge of that court, and the judges of the Supreme Court are to transmit the record with their judgment, to the Court of Common Pleas. The legislature seems to have taken great pains, (and there was no matter of legislation more worthy their serious attention,) to

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devise a system complete in itself, and have declared in language which it is impossible to mistake, in what court, and in what manner, divorces may be obtained, and matrimonial differences examined. It would require an express declaration, or a necessary implication in a subsequent statute, to oust the jurisdiction of the Court of Common Pleas, particularly as the mode pointed out in the act of 1815, is the most speedy and the best calculated to attain the great end of the legislature in its passage. Preparatory rules are to be made, and other steps taken, which would meet with great difficulty and delay, in a court which, from causes over which we have no control, meet but once a year, in the respective counties. The system can be executed with great ease and despatch by the Court of Common Pleas, who are bound by law to meet at least four times a year. The great delay, and consequent inconvenience, which would result from vesting the Circuit Court with this jurisdiction, is a powerful argument that the legislature did not contemplate in the act reviving the Circuit Court, the removal of this class of cases. To permit a removal, would be a virtual repeal of the act concerning divorces, as the delay would be such as that the cause would be most probably ended by the death of one of the parties. Again, if the Circuit Court have jurisdiction, what would be the extent of their power;—would they merely try the issue and certify it to the Court of Common Pleas? This, surely, the legislature did not intend. And where is the authority of the Circuit Court, (setting aside the inconveniences which I have shown to exist,) to make the decree? In what manner would an appeal be taken from their decision to the Supreme Court?—In the manner pursued in other cases clearly within the purview of the acts, or, would bail be necessary, and, if so, who would take the bail? Would the Circuit Court be under the necessity of calling in a judge of the Court of Common Pleas, to perfect the appeal? Again, after a final decree by the Supreme Court, to whom would they transmit the record with the judgment? The act of assembly directs, in express terms, that it shall be transmitted to the Court of Common Pleas, which would present the strange anomaly of the Circuit Court trying an issue, making a decree from which there was an appeal, and the final judgment of the Supreme Court transmitted to the Court of Common Pleas, to be carried into effect by them.

I have looked into the act reviving the Circuit Courts, and can perceive nothing in that act or the act thereby revived, which supports this idea. We must give that act a reasonable construction, and I should have esteemed it a misfortune if we had been compelled to have sustained the jurisdiction of the Circuit Court. It would have involved us in difficulties which time alone could have unravelled, created delays ruinous to the parties, and destructive of the public justice of the country, and have interfered with a system now understood and well calculated in the most speedy and effectual manner, to afford relief to the injured, and most frequently the

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most helpless party. The generality of the expressions in the second section of the act of the 8th of *April*, 1826, was not intended to enlarge the class of cases removeable into the Circuit Court. It has reference merely to causes pending, and which were within the true intent of the act, to which it was a supplement, and provides for their removal within one year.

The libel filed, required no amendment. It was deficient neither in substance nor form, but, under the authority of the case, *Steele v. Steele*, 1 *Dall.* 409, notice was required of the facts intended to be proved under the general allegations of the libel. This notice was not given as required, and the court rejected the evidence of the libellant, in which decision there was no error. The counsel for the libellant then moved the court for leave to amend the libel, which was refused. This may be assimilated to an action of assumpsit, in which the declaration is so general as to give but little information to the defendant, which, however, he may remedy, by requiring a bill of particulars of the plaintiff's demand, which, if he either neglects or refuses, he can give no evidence to support his claim. It is not in the power of the plaintiff, when he neglects to give the notice required, to retrieve himself, by a motion for leave to amend his declaration, for the declaration requires no amendment. The defect is not in the declaration, but in neglecting to comply with the requisition of the defendant, of a particular statement of his cause of action.

[LANCASTER, MAY 27, 1828.]

GILMORE and others *against* The COMMONWEALTH, for
GLASS and others.

IN ERROR.

The purchaser of property sold by order of the Orphans' Court, takes it divested of the lien of a recognisance given to secure the distributive shares.

Error to the District Court of *Dauphin* county, where judgment was rendered for the plaintiffs below and defendants in error, in a suit brought by the commonwealth for *Samuel Glass* and *James Glass*, administrators of *John Glass*, deceased, one of the children and heirs of *Samuel Glass*, a brother and heir of *William Glass*, against *John Gilmore*, Esq., surviving cognisor, in a joint and several recognisance with *Samuel Glass*, deceased, with notice to *William White* and widow *Swoyer*, terre-tenants, and *Espy* and *Jacobs*. The case came up to this court on a bill of exceptions to the opinion of the court below, in rejecting evidence offered by the defendants of the proceedings in the Orphans' Court, and sale by order of the same.

McCormic and *McClure*, for the plaintiffs in error.
Douglas, *contra*.

(Gilmore and others v. The Commonwealth for Glass and others.)

The opinion of the court was delivered by

ROGERS, J.—The admissibility of the evidence offered by the defendant, and rejected by the court, depends on the question whether the purchaser of property sold by order of the Orphans' Court, takes it divested of the lien of a recognisance, taken to secure the distributive shares of heirs and legal representatives.

John Glass died intestate, leaving real estate, and brothers and sisters, his legal heirs. The property was appraised, and taken at the valuation by a brother, *Samuel Glass*, who entered into a recognisance, &c. with *John Gilmore*, Esq., his surety. On the death of *Samuel Glass*, this property, so taken at the valuation, was sold by order of the Orphans' Court, for the payment of this, as well as other debts, and *John Gilmore* became the purchaser.

We shall throw out of view the circumstance of the surety having become the purchaser of the land, as in the absence of fraud, which is not alleged, he clearly had a right to do so to secure himself. We shall also take it for granted that the purchase money was paid over to the administrators, and is now in their hands, or in their power, ready to be applied to the payment of debts according to their legal priority. To which fund, then, are the recognizees bound to look for their money? to the funds in the hands of the administrator, or to the land itself, on the ground of a continuing and subsisting lien, notwithstanding the judicial sale by order of the Orphans' Court? The argument is, that the lien cannot be divested except by payment of the money. When *Samuel Glass* took the real estate at the appraisalment, he became a purchaser and owner of the fee simple, upon either paying or securing to be paid, to the other heirs, their respective parts of the value thereof. On confirmation of the sale, the fee simple goes into the hands of the purchaser, charged with the payment of the unpaid purchase money. The recognisance taken to secure the payment of these distributive shares is in the nature of a judgment or equitable mortgage, as appears by the case of *Walton v. Willis*, 1 Dall. 265. As respects sales made by the sheriff, it has been already decided that the lien of judgments, and even legacies charged on lands are divested, that the judgment creditor and legatee must look to the sheriff, as the purchaser is not bound to see to the application of the purchase money. These principles have been recognised by the Supreme Court in *The Commonwealth, for the use of Gurney's Executors, v. Alexander et al.*; and also in a case decided at *Chambersburg* at our last session, which is not yet reported.

The 21st section of the act of 1794 provides that no lands, tenements, or hereditaments sold by order of the Orphans' Court, shall be liable, in the hands of the purchaser, for the debts of the intestate. This section has received a judicial construction in the case of *Moliere, Lessee, v. Noe*, 4 Dall. 450, in which it was decided, "that a purchaser under a sale of land, by order of the Orphans'

(*Gilmore and others v. The Commonwealth for Glass and others.*)

Court, takes it discharged from the lien of judgments." The presumption always is, that the Orphans' Court and the administrator will do their duty, and, in that case, no injury can result to the creditor, as he will be entitled according to legal priority, to the money in the hands of the administrator. A circumstance, which has always weight with the court, is, that official sales can be more easily and advantageously effected, where the property is freed from liens in the hands of the purchaser, and where he is not bound to look to the application of the purchase money. As the recognisance is in the nature of a judgment, I cannot distinguish this, in principle, from the case of *Moliere v. Noe*, 4 *Dall.* 454, since recognised and confirmed in *Clark et al. v. Israel*, 6 *Binn.* 391. The only exception from the general principle, appears to be a legal mortgage, which stands on grounds different from other liens. The mortgagee is, strictly speaking, the owner of the land, and may recover it in ejectment. The mortgagor has nothing more than an equity of redemption, and the Orphans' Court have no power to sell a greater estate than he is possessed of. In the fourteenth section of the act which prescribes the order of paying debts, there is no mention made of mortgages, which goes to show that mortgages were not in the contemplation of the legislature at the passage of the act. 4 *Dall.* 450.

As, then, there is no difference, in principle, between judgments and recognisances, it is the opinion of the court that a purchaser of lands sold by order of the Orphans' Court, holds it discharged of the lien of recognisances as well as judgments. It follows from this, that the District Court erred in rejecting the defendants' testimony, and that the judgment must for this reason be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 27, 1828.]

GRATZ *against* The LANCASTER BANK.

IN ERROR.

A decree, by the Court of Common Pleas, awarding to a claimant money arising from a sale of land by the sheriff, paid into that court, is final and conclusive, though the court may have acted on a mistaken principle of law, in awarding it to a holder of a bond for the purchase money, as possessing a lien; and the District Court cannot afterwards, in a suit against such claimant by a judgment creditor to recover back the money, examine the propriety of the decree.

WRIT of error to the District Court of *Lancaster* county.

Norris and Hopkins, for the plaintiff in error.

Slaymaker and Buchanan, *contra*.

(Gratz v. The Lancaster Bank.)

The opinion of the court was delivered by

HUSTON, J.—The record in this case presented the following facts:—The *Lancaster Bank*, as endorsee of *T. R. Buchanan*, obtained a judgment, and issued a *fiery facias*, in 1817, against *William Houseal*, for a sum exceeding eight hundred dollars. The *fiery facias* was levied on a house and lot of the defendant, which was sold on a *venditioni exponas*, for one thousand six hundred and ninety-five dollars. The money was brought into court, or (what was the same thing) considered in court; and, on the 23d of June, 1817, a rule was taken to show cause why the proceeds of the sale should not be paid over to the *Lancaster Bank*.

On the same day a rule was taken, by Mr. *Hopkins*, to show cause why the purchase money should not be paid to *S. Gratz*, the owner of a bond given by the defendant, *William Houseal*, as a part of the consideration money for the property sold. This bond had been given to *T. R. Buchanan*, the vendor, by *Houseal*, and transferred, by *Buchanan*, to *Gratz*.

On the 24th of September, 1817, both motions were argued; and, after some consideration, the Common Pleas decided, “that the vendor had a lien for the purchase money on the estate sold, while the estate continued in the hands of the vendee, and where there is no contract by which it may be implied that the lien was not intended to be reserved. *Prima facie*, the purchase money is a lien, and it lies on the vendee to show the contrary. A judgment obtained against the vendee does not alter or defeat the lien; nor will endorsing a receipt on the deed and taking a bond for the purchase money affect it. We see nothing in the case before the court to prevent the operation of these principles, and therefore direct that the amount of the bond given to *T. R. Buchanan* for the purchase money of the estate of *William Houseal* be paid to the holder of the bond, out of the proceeds of the sale made by the sheriff.”

The next day after this decision the sheriff paid the money to the attorney of *S. Gratz*.

This opinion of the lien of purchase money on land sold by absolute deed recorded, and bond given for the purchase money, continued, as was admitted on all sides, to be considered the law in this district until the decision of this court in *Kauffelt v. Bower*, (7 Serg. & Rawle, 64,) put an end to the illusion. After that decision, the *Lancaster Bank* brought this suit to recover back from *Simon Gratz* the money so decreed to him by the Court of Common Pleas of Lancaster county, and which was paid to him in pursuance of that decree. The judge of the District Court decided that the plaintiff could, and ought to, recover; that though it was often requisite for the Court of Common Pleas to decree to whom money brought into Court shall be paid, under the liens of judgments of record against the defendant, in such cases they have

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complete jurisdiction over the subject matter; and, in another part, he says this was not a decision on the conflicting rights of judgment creditors, whose claims were evidenced *by the records of the court*. And, again, no judgment had been obtained on this bond; and the court had not rightful and necessary cognisance of it; nor was it in the court's jurisdiction, in this way, to put it in competition with the lien of the judgment in favour of the bank; and concludes, "The order of the Court of Common Pleas of *Lancaster* county, made the 29th of *August*, 1818, on which the proceeds of the sale of *William Houseal's* real estate was paid to the defendant, under the circumstances appearing in evidence, is not final and conclusive. The law is settled, that a bond given for the purchase money of a tract of land, where a deed is made therefor, is not a lien on the premises conveyed for its amount."

There were several other matters in this record in which error was alleged, which, not being material in the view here taken of it, will not be noticed.

The state of *Pennsylvania* is now divided into fifteen judicial districts; each district, to a certain extent, has different rules of practice, but the difference is generally slight. There has been also some diversity in more important matters,—perhaps there still is.

Every court in which money is recovered, must have the power of deciding to whom that money shall be paid. This has often been improperly, as I think, called the equitable power of the court. It is, though not always exercised through the instrumentality of a jury, as much a legal power as any other of the court. The practice in the exercise of this power, has been variant in different districts. In some, a case is stated; in others, the formality of a case stated is generally omitted, especially where the facts are few, and not complicated. The facts and dates are stated precisely, and noted by the judge from the statement of the opposing counsel, and no statement on paper is previously drawn up. In many, perhaps most districts, if the facts are disputed, or if it is wished to have the opinion of the Supreme Court, a feigned issue is directed; in others, a feigned issue is unknown. The practice is for the one party claiming the money to bring suit against the sheriff, and the other party claiming it to defend him. This was so exclusively the practice in the fourth district, that in a practice of twenty-five years there, I recollect no feigned issue.

If there was no issue, real or feigned, it was settled and well understood every where, that the opinion of the Court of Common Pleas was final. And, in every instance where either party wished a revision of the opinion in a superior court, a case was stated with express right to take a writ of error, or an issue real or feigned was resorted to. I have often heard counsel, after a decision on motion or on case stated, wish they had procured a decision in such way as to be entitled to a writ of error; but this is the first

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instance within my knowledge of an attempt to treat the decision of any court respecting the appropriation of money collected on execution, as being different from any other judgment of the court. This is of itself a strong argument against the plaintiff below in this cause.

Where the execution is levied only on personal property, and neither the judgment nor execution bound the property until execution delivered to the sheriff, not much intricacy can occur: but where the judgment binds the lands of the defendant, and every interest legal or equitable in lands; where this lien on the land expires within five years, unless revived by a *scire facias*; where there are not only often many judgments against the same defendant, but mortgages, which also bind; where lands of an intestate are appraised and taken in the Orphans' Court, and are subject to the lien of the shares of the widow or other children; or where, by order of the court, executors or administrators convey by act of assembly, expressly subject to a lien for the residue of the purchase money; or where lands have been devised to the defendant in execution, expressly subject to the payment of a legacy or legacies,—many inquiries may be necessary to determine who has the prior lien, and to whom money collected from the sale of lands is to be paid. The difficulty generally consists solely in ascertaining the dates. There is seldom any dispute whether a claim is really a lien or not—but whether it is the prior lien. On this, however, as on every other part of the cause from its inception, the law is or ought to be uniform: and it would be of little consequence to a party that a judgment had been obtained, if the possession of the money, the object of the suit, and that possession obtained on a solemn argument, left it still questionable whether he who had the decision of the money could hold it.

It has been long settled, that decisions of a court, founded on motions of a certain description, were not subject to a writ of error. If the parties wished for a speedy decision, the resort was to one mode. If a more solemn decision was desired, and a right to review in a superior court, the law provided it: the option was with the parties, and not with the court. It is even conceded, in the present case, that no writ of error lay. If this decision could not be impugned and reversed directly, by a superior court, it would be strange if it could be affected by the decision of a court of co-ordinate jurisdiction. There is nothing better settled than that the decree or judgment of a court of competent jurisdiction is conclusive between the same parties and their privies, on the matter coming directly in question in another court of concurrent jurisdiction, or of superior jurisdiction, if not brought before it by appeal or writ of error. And it is immaterial whether the decision was by a court and jury, or a court without a jury;—whether it was by a court of record, or not of record. I shall only refer to

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14 *Serg. & Rawle*, 181, and the cases cited in that case, and in the case in the note to it.

It seems to have been considered material that the bond was not sued in that court, and not a record of that court. This was not material: if the purchase money had been a lien, no matter whether the lien was evidenced by the records of the court which issued the execution or not. We have several courts in the same county. In *Philadelphia*, the Circuit Court of the *United States*, the Supreme Court, the District Court, the Common Pleas, and the Orphans' Court, all notice the liens arising from the judgments or decrees of each other; and all of them notice the lien created by charging money on land in a will, and a mortgage, which, though *recorded* in the proper office, is not a record of any court, until sued in that court. The criterion is not—does the lien appear by the records of the court called on to decide? but—does it exist by the laws of the land, and, have the parties interested submitted the matter to the court in any of the ways known and recognised by the law?

It was perfectly immaterial, also, that the court of Common Pleas had mistaken the law. The District Court was not a court in which the decisions of the Common Pleas were to be revised, nor was it material, that, in the course pursued, there was neither appeal nor writ of error. Such a course might have been taken as would have left the right of revision, but it was not. There are many such cases, and little injury arises from it. The legislature have provided hereafter that from such decisions an appeal, within a certain time and in a certain manner, shall lie to the Supreme Court. On the whole, there was in this case a decree by a court of competent jurisdiction in a case legally before them, which is final between the parties, and is conclusive on all other courts in this state: there is, therefore, error in the opinion of the District Court.

Judgment reversed.

[LANCASTER, MAY, 1828.]

The COMMONWEALTH, for ALLEN and others, *against*
FINNEY.

IN ERROR.

Recognisance on the docket, below the entry of the judgment, "S. F. of, &c., bound in the sum of three thousand and eight dollars and ninety-eight cents, conditioned for the payment of the debt, interest, and costs," signed by him and attested by the prothonotary's clerk, is a valid recognisance under the act allowing defendants to enter security for stay of execution.

WRIT of error to the Court of Common Pleas of *Dauphin* county, where a verdict and judgment were rendered for the defendant.

(The Commonwealth, for Allen and others, v. Finney.)

It was argued by *Douglas*, (with whom was *Elder*,) for the plaintiff in error, and *Wood* and *Fisher*, *contra*.

The opinion of the court was delivered by

HUSTON, J.—The record presented the following case:—

“Record of Common Pleas of *Dauphin* county: The Commonwealth, for *John Allen*, &c., v. *James Allen* and *C. Finney*. *Scire Facias* on recognisance: 20th of *December*, 1819. Defendants confessed judgment for one thousand five hundred and four dollars and forty-nine cents.”

On the docket, immediately below this, was the following entry:—

“*January* 7th, 1820, *Samuel Finney*, of *West Hanover* township, bound in three thousand and eight dollars and ninety-eight cents, conditioned for the payment of the debt, interest, and costs.

“*Samuel Finney*.

“Attest, *James A. Chambers*.”

On this a *scire facias* issued, tested 23d *February*, 1823. The *scire facias* recited the above suit and the above recognisance of *Samuel Finney*, &c. &c., pleas, payment with leave, &c., *nul tiel* record and issues. A jury was sworn, and the plaintiff offered the record of the suit and judgment above of the 20th of *December*, 1819, and the above entry, in evidence to the court on the issue in law; and to the jury to ascertain the amount and date, on issue in fact. The court decided it was no recognisance, and not evidence to support either issue of law or fact, either to court or jury. To this exception was taken.

By the 7th section of the act of the 21st of *March*, 1806, it is enacted, “That in all suits instituted by *capias* or summons, in any court of record in this commonwealth, the writ of execution shall be stayed on the judgment, whether it is obtained by the confession of the defendant, by report of referees, or by verdict of a jury, if the judgment shall not exceed two hundred dollars, six months: if not exceeding four hundred dollars, nine months; and, if exceeding four hundred dollars, twelve months, &c., if the defendant in the opinion of the court is possessed of a freehold estate, worth the amount of such judgment, clear of all incumbrances: but if the defendant is not a freeholder, as aforesaid, execution may issue immediately, unless the defendant shall enter surety in the nature of special bail, in which case there shall be stay of execution for thirty days; and if at or before the expiration of that term, the defendant shall give security for the amount of debt, interest, and costs, such defendant shall be entitled to the same stay of execution as if he was a freeholder.” On this latter clause the dispute arose. The kind of security is not mentioned; nor whether it shall be by bond or recognisance; whether on the docket or *in pais*; whether it shall be filed in the prothonotary’s

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office or kept by the plaintiff. The practice has been general to enter it on the docket, and for the surety to sign it. It is in some counties drawn more at large, and stated to be for the purpose of obtaining for the defendant the stay of execution allowed by law. In some counties it is taken in double the amount of debt; in some in the amount, and in some it is, "*becomes security for debt, interest, and costs.*" Where the stipulation is entered on the docket annexed to the suit, and the money not paid at the expiration of the stay of execution, *scire facias* or debt have been brought promiscuously.

If the security is by recognisance, it may be sued by *scire facias*. This was not denied in this case, but the recognisance is said to be defective, or rather that this is no recognisance.

Wherever, in the practice of any court, a certain process is often repeated, as entering special bail in the Court of Common Pleas, or bail to prosecute, or to appear and answer in the sessions, and in many other instances, the officer in every court takes at the time but a short note of it, though he repeats the recognisance verbally at large to those entering into it. This short note may be enlarged when the record is to be made up into a full recognisance. This, I think, is the practice of all courts; and if the entry by the officer at the time is sufficient to show what the obligation entered into really was, it is sufficient. *The Commonwealth v. Emery, 2 Binn. 431.* In taking special bail, this form is universal, and has not yet been disputed. The kind of obligation in this case is very common, and there have been but few questions on it: but we live in an age where every thing is with some people questionable. To a man unacquainted with the act above recited, and the practice under it, the entry in question might appear strange; but no lawyer in this state can mistake it. The man who enters into it understands it; the plaintiff understands it, and is delayed by it; the defendant gets the advantage of it: but the court are asked to say it had no meaning nor effect. It shows what *S. Finny* agreed to do—the amount of his obligation: its situation, annexed to the suit, is not to be overlooked. Without this, all notes of recognisances of special bail would be unintelligible: it is from their position on the docket we know in what suit they are taken. With us the record is never made up at large and enrolled. When the record is wanted in another court, it was the practice at one time to draw all those short notes of recognisances, &c. &c., out at large; but that is seldom done at present,—I might say never, unless the record is to go to another state, and not often then. If the short entry on the docket is sufficient in the court where it was made, it is sufficient in every other court in the state.

The entry then is as full, and more so, than what is made when a man goes special bail, or when he enters bail in a criminal court for the appearance of the defendant at next term; in neither of which the condition is ever set out on the minutes of the court or on the

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docket to which those minutes are transferred. The sum here is double the judgment. Enough of the condition appears to show that *Finney* was not special bail, but security for debt, interest, and costs. Courts must take notice of our acts of assembly—it would be affectation to pretend we had any doubt that this was an engagement under the act above cited. We see no reason why the whole condition should be stated at large under this act, and not be necessary in any other recognisance of bail; and we think enough appears in this case to justify the officer in drawing it up at large, or the court, under our practice, to consider it as if drawn up at large.

Another objection was taken,—that the prothonotary did not appear to have been personally present, though his deputy and clerk, who it is admitted transacted all the business of the office, was, and attests it.

Much learning, useless in this case, was exhibited in proving that a recognizance must be taken in a court, or before a judge,—and, of course, could not be before a deputy. Our act of 1791, section 12, expressly gives to the prothonotaries of the several courts powers to take bail, &c. It has never been questioned, nor can it, that a prothonotary may make a deputy, and a deputy may do all acts which his principal can do. *The Commonwealth v. Grayson*, 5 *Serg. & Rawle*, 333.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 27, 1828.]

SEWALL *against* The LANCASTER BANK.

IN ERROR.

Under the act of 1814, banks have a lien on stock, though levied on by a judgment creditor, for notes drawn before but falling due after the levy, even though renewed.

On a sale of stock in bank on an execution, the record is the evidence of the vendee's title.

If a debtor to a bank which has a lien on his stock owes less than the value of it, the bank may hold the whole till that debt is paid: they are not obliged to appropriate part and transfer the rest.

Trover does not lie to recover shares of bank stock.

WRIT of error to the District Court of Lancaster county.

Frazer and Hopkins, for the plaintiff.

Buchanan, contra.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff having a judgment against one *Andrew Boggs*, levied his execution on one hundred shares of stock in the Lancaster Bank. The *fieri facias* came to the hands of the

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sheriff on the 20th of *August*, 1819. The sheriff sold the stock to the plaintiff on the 20th of *March*, 1820.

Andrew Boggs was indebted to the *Lancaster* bank as follows: on two notes which had fallen due before the levy, and were not renewed, four hundred and twenty-six dollars; on two other notes, which notes were dated before the levy but fell due after the levy, about eight hundred and twenty dollars, these were not renewed when they fell due, nor were they ever protested; and, on a third note, dated before the levy, and which fell due after the levy, and was renewed twice, but which eventually fell due on the 4th of *February*, 1820, before the sale, and was not renewed or protested, twelve hundred dollars; on the stock *Boggs* had paid to the bank, about two thousand five hundred dollars. The bank, before the sale, gave notice that it claimed to have a lien on the stock of *Boggs*, for the amount due by him to the bank.

The act chartering the *Lancaster* bank with others, in 1814, had this clause: "Article 11. The stock of each of the said banks shall be assignable and transferrable on the books of the corporation only, and in the presence of the president or cashier, in such manner as the bye laws shall ordain; but, no stockholder indebted to the bank, shall make a transfer or receive a dividend until such debt is discharged, or security to the satisfaction of the directors is given for the same." The general understanding, as well as the obvious meaning of this clause is, that if a transfer is permitted to be made on the books of the bank, the person to whom stock is transferred, would hold it discharged from any lien for debts due the bank. The security is put in the hands of the bank: no transfer can be made unless their officers produce the books and permit the transfer; if they do permit it, the lien of the bank is gone. The transfer on the books is, in general, conclusive of the right, at least against the bank. The plaintiff contended, that the phrase indebted to the bank, applied only to debts for stock or notes which had actually fallen due and were unpaid; and, that even on these the bank must, if possible, collect the money by suit on the notes against the drawer and endorser. We give no opinion on the act of 1824, in which the language is different; but, the construction of the act of 1814, is settled by general usage under it, by the case in 8 *Serg. & Rawle*, 73, and the express decision on the point in *Rogers v. The Huntingdon Bank*, 12 *Serg. & Rawle*, 77. The statement of that case is not very full or explicit, but the notes of *Maxwell* were not payable when he gave the power to transfer, and his notes were renewed at least once before suit was brought. I brought the suit for the plaintiffs. We concur in the opinion there given, that the bank under that act, have a lien for all money owing to it by a stockholder, and may refuse to permit a transfer of stock until the debts of the stockholder to the bank, are paid.

It has been contended, that the act of the 29th of *March*, 1819,

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is material: it says, "the stock of any individual, in his or her own name, shall be liable to be taken in execution, and sold in the same manner that goods and chattels are liable to be so taken and sold; subject, nevertheless, to any debt due by any holder of such stock to the company or body corporate." We are of opinion that act does not purport to affect the lien of the company, and does not affect it. The right of the stockholder alone is subjected to levy and sale; it is sold and it is purchased precisely as it was held, in no worse and in no better situation than he had it: nothing in this act indicates any intention to give the creditor or purchaser any greater right than the debtor had, and subject to the lien which bound it in his hands. It is long settled, and not disputed, that a lien is a good bar to an action of trover, 2 *Saund.* 47, and to an action on the case. 8 *Serg. & Rawle*, 73. The bank had a lien, and were justified in refusing to permit a transfer of this stock until that lien is discharged.

It has been insisted here, that a sheriff who sells stock, may or must transfer it on the books; generally, the sheriff who sells personal property does not give, and is not bound to give, any other evidence of title, than a receipt for the price of the article. The record is the evidence of the purchaser's title; and, if this lien was paid off, will be good evidence in this case.

As this opinion settles all the points material in the cause, we need not go further; we mention, however, several matters discussed in the argument. The bank are not bound to appropriate a part of the stock to pay their debt, and transfer the balance to the plaintiff, even if the stock were sufficient to pay it and leave a balance.

Though trover might lie for a certificate of stock, as it does for a bond or deed, yet it will not lie for one hundred shares of bank stock, any more than it would for a debt due on a right of entry.

Judgment affirmed.

[LANCASTER, MAY 27, 1828.]

JACOB FRANTS, for the use of P. STINE, *against* PHILIP BROWN.

APPEAL.

In debt on a bond at the suit of an assignee, it is a good defence under the plea of payment, that the obligor before he knew of the assignment and before the bond became due, had become bound as security for the obligee in sums exceeding the amount of the bond, and had been obliged to pay them.

Norris, for the defendant.

Weidman and Norris, for the plaintiff.

(Frants, for the use of Stine, v. Brown.)

The opinion of the court was delivered by

HUSTON, J.—Appeal from the Circuit Court of *Lebanon* county, debt on bond, plea payment with leave, &c.

The plaintiff gave in evidence a bond executed by *Philip Brown* on the 29th of *March*, 1819, for eight hundred dollars, payable on the 1st of *May*, 1824, assigned to *Philip Stine*, in presence of one witness, on the 22nd of *May*, 1819. The defendant read his notice of special matter intended to be given in evidence under his plea, a copy of which had been duly furnished to the plaintiff. It was, that after the execution of the bond in question, *Frants*, who had sold land to *Brown*, purchased mills, &c., from *Adam Breckbill*, and, after paying a part in hand, was to give bonds with security for the instalments; viz. four hundred dollars yearly, till 1835: that *Brown* being indebted to him, *Frants* applied to *Brown* to be security with him in the bonds, who refused; but, on being promised that he should have a credit on his own bonds to *Frants* for any money he might be compelled to pay as surety for *Frants*, he agreed; and on the 6th of *April*, 1819, signed fifteen bonds as bail of *Frants* to *Adam Breckbill*.

That he had been compelled to pay, and had paid four of these bonds, amounting to much more than the bond in suit; that these payments were made after being sued on the several bonds as they fell due, and before the bond in question became due, and before he had notice of the assignment of it; and that *Jacob Frants* has been long insolvent.

The court rejected the first part of the offer; viz. proof of the parol agreement by *Frants* with *Brown*, that he should have credit on his own bonds for any money he might be compelled to pay as surety for *Frants*, but received evidence of payment made by him before notice of the assignment, to *Stine*, and in consequence of liability incurred before that assignment.

The defendant then proved payment by *Brown*; viz. the three first of the four hundred dollar bonds and part of the fourth, which was also taken up by him, and a promissory note for the balance, before the present bond fell due, or any proof of notice of the assignment; and whether these payments were a defence in the present suit, was really the only question at the trial, and here.

But, other matters were offered and received at the trial, and evidence given to rebut, &c., &c. After the defendant had proved the payment of the bonds in which he was surety, the plaintiff offered to prove that *Stine* had furnished funds to *Brown*, to enable him to take up those bonds, and they proved that *Brown* received from *Wilsmeyer*, about one hundred and seventy dollars of rents of lands which had belonged to *Frants*, and that *Frants* confessed a judgment to *Brown*, on which, in 1821, he levied on *Frants's* personal property, and the sheriff paid him, *Brown*, six hundred and forty dollars. They also proved that *Frants*, in consideration

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of one dollar, and of the great losses *Brown* had sustained, and to indemnify him for responsibilities for *Frants*, had conveyed to *Brown*, in 1823, an undivided interest in a lot of ground, &c., which he, *Brown*, sold in 1825, for two hundred and forty dollars.

The defendant, then, to repel this, offered to prove, and did prove, that *Brown* was security of *Frants* to another person; viz. *Henry Breckbill*, and as such was sued; that the judgment just shown, was confessed by *Frants* to secure *Brown* against this, and that the six hundred and forty dollars raised on this judgment, never went into *Brown's* pocket, but was instantly paid to *Henry Breckbill*; and, to show the responsibilities incurred for *Frants*, they offered and were permitted to show, that *Brown* had signed eleven bonds falling due annually up to 1835, as bail to *Adam Breckbill*, for *Jacob Frants*. That *Frants*, in 1821, assigned all his property, which had been sold, and all applied to other debts of *Frants*, except seventy dollars which by *Frants's* direction, had been paid to *Brown*.

Much was said in the discussion here, about the admission of this last testimony; but, it was strictly repelling testimony, and applied directly to what had been just given by the plaintiff. If the counsel will, as they too often do, go out of the real case trying, and give testimony which appears applicable to the case, but which, when explained, eventuates unfavourably to their client, they must not complain. No doubt, the proof that *Brown* was liable for *Frants* to *Henry*, as well as *Adam Breckbill*, and that he is still liable, and will be for many a year, were calculated to raise, in the language of the counsel, an impression favourable to the defendant; but this proof was rendered legal and even necessary by what the plaintiff had just introduced. The jury were told, that from the evidence it appeared, that before the assignment of the bond in suit, the defendant had become bound for *Jacob Frants*, who then held this bond, in large sums of money, a part of which had become due, and the defendant had, by suit, been compelled to pay an amount exceeding the present demand of the plaintiff before he knew of the assignment, and before the money on the present bond became due; that this was a defence against the payment of this bond in the hands of the assignee, and the correctness of this opinion was the principal matter contested in this appeal.

It may appear strange and is strange, that the construction proper to be given to an act passed more than a century ago, and one applying to the daily transactions of men, and of constant occurrence in courts of justice, should be at this day a subject of serious dispute. We have, in our earliest book of reports, 1 *Dall.* 23, the report of a trial, the arguments of counsel at full length, and nothing added to them, in any argument I have ever heard, and a full opinion by a judge, of whom from the opinions of his which have

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reached us, we may safely say he was a great lawyer. This case did not decide every possible question which could arise under this act, but it decided, that the assignee takes the bond at his peril, that he stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment or *notice of the assignment*. The *English* statutes of set-off have been often brought in to affect the construction of this act, and our defalcation act, which takes in many cases not embraced in the statutes of set-off, is, in these cases, studiously kept out of view. The statutes of set-off apply to accounts or debts existing mutually at the time of suit brought; a bond may be assigned many years before it is due, of course many years before a suit can be brought on it. The obligor, by some other bond or note, or by some contract or bargain, may have claims on the obligee which will become due before the time when the bond is payable. This matter came before the Supreme Court in 1802. *Gordon's Assignees v. The Insurance Co. of N A., 3 Yeates, 327.* The insurance company executed two policies of insurance on the 18th of *April, 1797*, to *Gordon*, on a vessel and cargo. On the 18th of *April, 1797*, *Gordon* assigned both policies to *Pratt* and *Kintzing*, to secure a just debt. On the 15th of *May*, he assigned all his surplus property to *J. James*, for the benefit of his creditors, and, on the 7th of *July, 1798*, *Pratt* and *Kintzing* having received their debt in some other way, assigned these policies to *J. James*, the general assignee of *Gordon*. The company claimed a defalcation for seven notes of *Gordon* given before the assignment, payable at different days after the assignment, amounting to fifteen thousand one hundred and twenty-five dollars, also the sum of eleven hundred and seventy-five dollars, on two charges of premiums made on the 22nd of *April* and 11th of *July, 1797*, with a credit of three months: these were after the assignment, but before notice, and some other matters. The opinion of the court was delivered by Chief Justice SHIPPEN. The assigned policies are put on the same footing as assigned bonds:—"If the suits had been brought by *Gordon* for his own use, the set-off would clearly obtain against him, and operate as a defence *pro tanto*, because the counter demand had actually become due before the actions were instituted, and if the insurance company have fairly and duly made their claim known, their right of set-off continues against the assignees." And, after stating that the holder of bills of exchange and notes payable in *Philadelphia*, without defalcation, may recover the amount free from any embarrassment on account of counter demands of drawer or maker, or want of consideration between original parties, he proceeds: "Bonds may be assigned by our law, so as to enable the assignee to bring an action in his own name, but *without the other qualities of negotiable papers*; that is, *if the obligor had, before the assignment, any just demand against the obligee, which he would have set off against him, if there*

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had been no assignment, he may set off the same against the assignee who takes the bond subject to all the equity that it was subject to before the assignment," except where a person, before taking an assignment, calls on the obligor, who tells him it is good and will be paid, and there leaves the facts as to notice of assignment to the company, and whether they had in any way waived their right, or ever concealed it to the injury of the other creditors. The defalcation was allowed. This was a *nisi prius* case, but is cited and relied on to its full extent in 1 *Binn.* 439, in an opinion of the whole court delivered by the late Chief Justice in *Bury, Assignee of Binkley, v. Hartman*, 4 *Serg. & Rawle*, 175. All this is recognised, and I think carried farther by a decision, that payment by the obligor to the obligee after assignment, though before notice of it, is good. In *Lighty v. Brenner*, 14 *Serg. & Rawle*, 127, it seems this very point was decided. The court below had rejected evidence to prove, that before the assignment the obligor had paid some money for the obligee; and that since the assignment he had *paid other sums for which he had been bound previous to the assignment, and for which judgment had been obtained against him*; on a bill of exceptions to this opinion, the judgment was reversed, and this court decided, that the evidence ought to have gone to the jury. It is true that in that case it was proved the assignee had been told before he took the note, that there was a defence to it. But, it is also true that it was a note payable without defalcation, and all these cases were elaborately and fully considered. All the other decisions are in accordance with these except two; *Reed v. Ingraham*, 3 *Dall.* 505; this was not a bond, and seems to have been decided on the principle that it stood by custom and the understanding of brokers, on the same footing with *mercantile paper*. 9 *Serg. & Rawle*, 157. This was not an action on the bond, the liability of the obligor to pay was not in question. It was a feigned issue, directed to ascertain the facts disputed, on a motion to vacate judgment entered on a bond with warrant to confess judgment. The bond was expressly given by the obligors to raise money on it, and a general warrant of attorney to confess judgment on it was annexed to it; at the same time, the obligee gave the obligors a written agreement that he would not enter a judgment on it in *Chester county*:—he assigned it, and the assignee entered judgment on it in *Chester county*. The obligors moved to vacate this judgment. There was no question as to set-off or defalcation, legal or equitable, or as to the amount of the bond; the question solely related to the validity of the judgment, and this court decided, that the judgment should stand. The transaction was a palpable fraud on whoever should become the assignee. I will not say, that even want of consideration fully proved, would avail an obligor who executed a bond and gave it to the obligee expressly to go and cheat somebody with it; but, in the decision of this case, some *dicta* occur contrary to

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the cases above cited. If general *dicta* in cases turning on special circumstances, are to be considered as establishing the law, nothing is yet settled or ever can be long settled. An eminent judge, (BENSON,) has left us, in one of the *New York* cases, an animated appeal against charging him as liable for the correctness of *dicta*, on points not trying; and I join him, most cordially. What I have said or written out of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but, I will never consider myself bound by it when the point is fairly trying and fully argued and considered. And, I protest against any person considering such *obiter dicta* as my deliberate opinion. In *Mann v. Dungan, Assignee of Morris*, 11 *Serg. & Rawle*, 75, the present Chief Justice, whose expressions in the case in 9 *Serg. & Rawle*, are relied on, had the very point before him; and he decided, that Mrs. *Morris*, who held the bond of *Mann*, and who, on the 1st of *April*, 1822, would, by articles of agreement, become indebted to *Mann*, could not, on the 29th of *March*, 1822, only three days before she would become the debtor instead of creditor, assign *Mann's* bond so as to enable the assignee to recover it clear of defalcation, and this deliberate opinion of the whole court is in precise accordance with the whole train of authorities for fifty years. Bonds never can become the substitute for, or be used as mercantile paper is; the necessity of proving the execution of them, and of the assignment of them, forbids it; the law forbids it, and there is no necessity for it; money and notes have been found sufficient in the most mercantile countries; and, among people in the country, it would be of bad consequence if every one who by falsehood, imposition, or fraud, had got an honest man's bond, could, by assigning, compel payment where nothing was due in law or in justice.

The opinion of the Circuit Court is affirmed.

[LANCASTER, MAY 28, 1828.]

SILVER, Appellant, *against* WILLIAMS and another,
Appellees.

The right of preference given to servants by act of assembly, out of the assets of a deceased debtor, is extinguished by their having taken from him single bills payable at a future day with interest.

APPEAL from the Orphans' Court of *Dauphin* county.

Martin Greider, jr., died intestate, leaving some property, but not sufficient to pay all his debts. Auditors were assigned to apportion the assets. They rejected the demands of *Williams* and *Dimmy*, who claimed to be first paid their debts in full, due to them as servants of the intestate, under the act of assembly which

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gives a priority of payment to "physic, funeral expenses, and servants' wages." The Orphans' Court reversed the decision of the auditors. From that sentence of reversal this appeal was taken by *Seiler*, a creditor by single bill. Many depositions were produced on both sides; the most material of them given since the decision of the court below. It was contended by the appellant, that *Williams* and *Dimmy* never were domestic servants, and therefore entitled to no priority of payment. 2. That, whatever their service was, *Williams* had left it a year or two before the intestate's death. 3. That each of them had taken a single bill from *Greider*, the intestate, for the money due: *Dimmy* a bill payable in one year, with interest, and with *John Zerker* as a surety for the money, bound jointly and severally; and *Williams* a single bill payable in nine months with interest, but without any surety. 4. That the bill to *Dimmy* was for money lent, as well as for wages.

After a concise argument, chiefly upon the facts, by *Douglas* for the appellant, and by *Elder* for the appellees, the opinion of the court was given by

TOD, J.—As well as can be judged of proof from depositions, there is strong doubt whether the appellees ever were employed as domestic servants.

There is contrariety of evidence; and the time of the completion of the service is not fixed either in the case of *Dimmy* or of *Williams*. We decide the case on a point relative to which there is, as to the fact, no dispute; and, as to the law, no difference of opinion on the bench. We all think that the right of preference of the appellees, as servants claiming their wages, supposing them even to have once had such right, has been waved and extinguished by their taking from the intestate single bills payable at a future day, with interest, and one of them with a surety. The decree of the Orphans' Court is reversed, and the report of the auditors confirmed.

[LANCASTER, MAY 31, 1828.]

EICHELBERGER against BARNETZ and others.

CASE STATED.

Bequest to testator's grandson, A. E., of a sum of money; "and if he should die without issue, then the part, as willed to him, is to fall to my heirs back, to be divided amongst my children, as in my will is mentioned, share and share alike." The bequest over is good, and A. E. cannot recover of the executors without securing the legatees over.

AMICABLE *scire facias* to revive a judgment, in which a case was stated in the nature of a special verdict.

The recovery of the original suit was had upon a statement for the first instalment of a legacy of fifteen hundred pounds, bequeathed, by

(*Eichelberger v. Barnetz and others.*)

Frederick Eichelberger, deceased, to the plaintiff. The interest due on the judgment was paid to the plaintiff before the entry of this *scire facias*, and the defendants offered to pay the principal, if the plaintiff would give reasonable security to refund the same, in case he should die without issue, which security the plaintiff refused to give. If the plaintiff is legally bound to give security as aforesaid, then judgment to be given in favour of the defendants, to bar recovery of the principal until security be given. If the plaintiff is not bound to give security, then judgment to be entered for the plaintiff generally.

By the will of *Frederick Eichelberger*, deceased, *Charles A. Barnetz*, one of the executors, was appointed trustee to receive all the monies in anywise bequeathed to the children of *Daniel Eichelberger*, of whom two were minors. The other two executors were also trustees as to the estates willed to *Sarah Lutman* and *William Eichelberger*. In the record of the original judgment, these trustees were all made parties in the cause. The lands of the testator were devised to the said trustees.

The clauses in the will of *Frederick Eichelberger*, under which the question arose, were as follows:

“Item.—I give and bequeath to my grandson, *Abraham Eichelberger*, son of *George Eichelberger*, deceased, the sum of fifteen hundred pounds, the sum which his step-father, *Martin Eichelberger*, has in his hands, nine hundred dollars already of which his mother is to have the interest during her natural life, and, after her decease, to be considered as a vested legacy to come to him; and it is farther my will, that, if my grandson *Abraham* should die without issue, then the part, as willed to him, is to fall to my heirs back to be divided amongst my children, as in my will mentioned, share and share alike.

“I also direct my executors, in case the money willed to the legatees should not reach to pay them their respective shares, then it is my will and meaning that all my land, now in my possession, be equal valued and divided, to be laid on every acre to make up the sum I willed to my legatees, and their money to be paid in eight equal yearly payments, without interest.”

Barnetz, for the plaintiff in error.—The legacy over is good. *Fosdick v. Cornell*, 1 Johns. 440. The dying without issue is restrained to the death in the case of personalty. 1 P. Wms. 564. 534, 666.

Lewis, contra, cited 16 Johns. 400.

The opinion of the court was delivered by

GIBSON, C. J.—A chattel cannot be entailed; and where it is bequeathed by words which, if used in reference to land, would vest an express estate tail, the interest passes absolutely. But, in regard to words that would vest an estate tail by implication, a diversity has been attempted, and sometimes apparently with success. There, it

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has been said, the contingency of dying without issue is, in no case, too remote to support a limitation over by way of executory devise, the words dying without issue being taken in the popular sense. And the reason given for the distinction seems extremely plausible; the words dying without issue being taken, it is said, to import an indefinite failure, in respect to real estate, in order to create an estate tail in favour of the issue: whereas, such a construction, in respect of a chattel, cannot benefit them, because a chattel cannot descend to them. But this distinction, although recognised in *Target v. Gaunt*, (1 P. Wms. 433,) *Forth v. Chapman*, (1 P. Wms. 667,) and *Atkinson v. Hutchinson*, (3 P. Wms. 239,) has undoubtedly been exploded since; but for what cause it is not easy to say, except, perhaps, a sense of the practical inconvenience of such limitations in respect of chattels. Yet, on the other hand, we find the judges eagerly catching at accidental words, such as "leaving," "behind him," &c.; and from these, endeavouring, by forced conceits and flimsy distinctions, to support them. In the will before us, we are relieved from the necessity of catching at straws, by a circumstance which proves incontestibly that such a contingency was meant as would necessarily happen within a life, or lives in being. It is in this clause: "And it is further my will, that if my grandson *Abraham* should die without issue, the part, as willed to him, is to fall to my heirs back to be divided amongst *my children*, as in my will mentioned, share and share alike." Here the contingency was contemplated to happen in the lifetime of the children, which is not too remote, even in the case of real estate. The limitation over is therefore good, and the plaintiff is consequently not entitled to recover without securing the legatees over.

HUSTON, J., dissented.

Judgment for the defendants.

[LANCASTER, MAY 27, 1828.]

WHITEHILL and another *against* WHITEHILL and another.

IN ERROR.

If, in a writ against two, and rule of reference taken out by the plaintiff, it appears by the record, that one of the defendants appeared and acted for himself and as agent for the other, and an award was made against both, it will be held good on a writ of error. The party should, if the agent were unauthorized, have applied to the court below for relief.

Writs of error may be waived by the delay of the party, his omission to apply for relief to the court below, and other circumstances.

The opinion of the court was delivered by

HUSTON, J.—*John Robison* and *James Whitehill*, executors of *John Whitehill*, brought an action of debt not exceeding five hun-

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dred dollars, against *Samuel A. Whitehill* and *John Wilson*. A rule of reference was entered by the plaintiff, and on whom it was served does not appear; but on the 14th of *May*, the day appointed, *Samuel A. Whitehill* appeared for himself and as agent for the other defendant; and he and the plaintiff chose arbitrators. The arbitrators met on the 31st of *May*, and another was substituted in the place of an arbitrator who did not attend. The arbitrators were then sworn, and, at request of the defendants, adjourned. There was another adjournment till the 1st of *July*, when they met and awarded to the plaintiff six hundred and forty-three dollars and fifty cents, and costs of suit.

To *January*, 1821, a *fiery facias* issued, which was returned debt, interest, and costs paid. On the 21st of *November*, 1821, *James Whitehill* acknowledges satisfaction on the record. A writ of error issued to *May* term, 1824. The affidavit and bail are by *Samuel A. Whitehill*. At the issuing of this writ *James Whitehill*, the executor who received the money and entered satisfaction, was dead, as appears by the record.

It was stated, by the counsel on both sides, that, in fact, no money was paid; but that *Samuel A. Whitehill* and *John Wilson* gave a bond for the money, on which the sheriff, as directed, made the return above, and *James Whitehill* entered satisfaction.

The errors assigned were,

1. Error in awarding six hundred and forty-three dollars and fifty cents, when the plaintiff, by his writ, declared his demand did not exceed five hundred dollars. This court remitted the record to the court below, that the sum of one hundred and forty-three dollars and fifty cents might be released. This was done, and the record returned.

2. The assignment is in these words: "The plaintiffs sue two; take a reference against both; serve the rules on one only; take an award against both: this is error. So it would be error if the award were against one only."

In the first place, there is nothing in the record expressly to show whether the rule was served on one, or both, or neither: it only appears that, on the day appointed to choose arbitrators, "*Samuel A. Whitehill*, one of the defendants, appeared for himself and for the other defendant." The arbitrators were chosen. The law says, "Where both parties attend, either by themselves, or agents, or attorneys, the arbitrators shall be chosen, &c." Now, this act throughout speaks of the appearing of both the plaintiff and defendant by agent. It is not, and never was necessary, either that the word agent should be written on the docket, or that the agent should produce or file his authority, or even that it should be in writing. All that the law requires has been done here, and appears on the docket.

I do not say a man will be for ever concluded by the act of a person who, without authority, acts for him in choosing arbitrators;

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but I do say, that if he afterwards pays the debt, or compromises and secures it, without complaint, and lies by three years until the plaintiff is dead, he will never succeed, and never ought to succeed, in reversing a judgment, because his agent's authority was not filed; and that too where he never even ventured to make his own affidavit that he never authorized the agent to act for him. But I do not put it upon that ground: he appeared and chose for him; and until his authority to do so is impugned, I would take it, he was a good agent throughout. The Common Pleas would have relieved at once on application: where that is not made, it is not, under the circumstances of this case, any ground to reverse.

3. The third error, that no notice of time and place of meeting of arbitrators was given to *Wilson*, nor did he attend, is not supported by the record. The arbitrators state expressly, that the first adjournment was on request of the defendants. There are two other errors assigned as to the execution. This is not before this court; and if it was, there is nothing in the matters alleged.

Writs of error were intended to correct errors which really injured a party. They may be waived, or what would have been error may be waived by the conduct of the party. Wherever a matter of form which affected the party is of such a kind, that, if true in fact, redress must have been obtained at once by application to the Court of Common Pleas; where no complaint was ever made to that court; where money is collected or paid, and no allegation against, it would be strange if, three or four years after, we should reverse, because every thing does not appear in the most precise form in all previous stages.

Judgment affirmed.

[LANCASTER, MAY, 1828.]

LEINEWEAVER *against* STOEVER.

IN ERROR.

If a verdict in dower, where the husband did not die seised, finds, among other things, the value of the land, this will be considered as surplusage, and not vitiate the rest.

The opinion of the court was delivered by

HUSTON, J.—This is a writ of error to *Lebanon* county. The verdict is in these words: "Jury found for the plaintiff, and that *Tobias Stoever*, the husband of the plaintiff, was seised in fee of the premises; that he aliened the same in fee simple, on the 1st of *April*, 1814, to *P. Leineweaver*, the defendant, who has been in

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possession of the same ever since; that the premises at the time of the said alienation, were of the value of five thousand and fifty pounds; that *Tobias Stoever* died in *August*, 1824, before the institution of this suit, and that the plaintiff was the lawful wife of the said *Tobias*, at the time of the alienation."

On this, judgment was entered. To be sure, there was a mistake in finding the value of the fee simple, instead of the annual value; or, rather as *T. Stoever* did not die seised, it was surplusage to find any thing about the value.

The jury have found all the material facts, and one totally immaterial; if the plaintiff should ever take a writ of inquiry for damages, or mesne profits, she may subject herself to a writ of error; but, if she only takes her writ of seisin, there will be no harm done, even if this were more than surplusage and actual error, the Court in this action can affirm in part and reverse in part.

Judgment affirmed, considering this finding as to value in this case as mere surplusage.

[LANCASTER, JUNE 3, 1828.]

BIXLER and Wife *against* KUNKLE and another, Executors of KUNKLE.

IN ERROR.

If executors, who are appointed by the will trustees to purchase land for the use of the testator's daughter, so that her husband can have no share of it, and in the meanwhile to pay her the interest, have received the money, and suffered a length of time to elapse, and then refuse to perform the trust, and claim the money on the foundation of a release fraudulently obtained by paying about one half of the money due, which sum the husband had laid out in land as the will directed, and the plaintiffs offered to let the money, when recovered, remain in court to be laid out in the same way, the husband and wife, suing for the use of the wife, may recover as well the principal money due as the interest, in an action of *indebitatus assumpsit* against the executors as such.

The naming the defendants executors in the writ, is surplusage.

A release obtained by executors and trustees from the *cestui que trusts*, strangers living in another state, by payment of about half the money due, is fraudulent and void.

If a case in nature of a special verdict is stated, the defendant cannot, though he reserves the right, object to the generality of the declaration.

WRIT of error to the District Court of *York* county. The plaintiffs in error, *John Bixler* and *Anna Mary* his wife, for the use of the said *Anna*, were plaintiffs below. The writ was in debt not exceeding two thousand, eight hundred dollars.

A declaration was filed containing one count as upon a general *indebitatus assumpsit*. "For that whereas, heretofore, to wit, on the 1st *April*, 1826, the said *Christian Kunkle* and *Christian Gingrick*, were indebted to the said *Anna Mary*, in the sum of

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two thousand dollars, by the said *Kunkle* and *Gingrick* before that time had and received, to and for the use of the said *Anna Mary*, and to be paid by the said *Kunkle* and *Gingrick* to the said *Anna Mary*, when they should be thereunto afterwards requested, whereby action hath accrued to the plaintiffs to demand and have of the said *Kunkle* and *Gingrick*, executors as aforesaid, &c." Plea *nil debet*, with leave, &c.

Afterwards the parties agreed upon a case stated, *to be considered as a special verdict found upon the declaration and pleadings filed.*

The case included the papers in full, and the material facts, the substance of which was as follows:—*Baltzer Kunkle*, father of *Anna Mary Bixler*, died in 1812, leaving a will, and the defendants executors of it, directing them to sell his real and personal estate, and reserving five hundred pounds to be on interest for the use of the widow during her life, and giving her sundry smaller legacies, directed an equal distribution of the residue among all his children in these words: "and at and immediately after the death of my said wife, the said sum of five hundred pounds shall be paid and distributed among my children, share and share alike.

"And after the hand money and the money of my personal property is all equally divided, it is my will, that the yearly payments of my said real estate, shall be divided as follows:—the first bond or payment coming due, my son *Christian*, and my daughter *Maria Elizabeth* shall get; the second, *Catharine*, intermarried with *Jacob Coleman*, and my executors in the room of my daughter *Anna Mary*; and the third bond my daughter *Eve*, intermarried with *Christian Gingrick*; and the heirs of my son *Jacob*, deceased, and so on in rotation until the whole of the said bonds is paid off. *They, my said executors, are to draw my said daughter, Anna Mary's, whole share of my said real and personal estate, and paying to her for her use the interest of her said share, until they can purchase real property with the same for her use, as her husband, John Bixler, shall have no share of the same.*"

Previous to the year 1816, the executors had sold the land, &c., under the will. On the 2nd of *April*, in that year, the executors paid to the plaintiffs one thousand five hundred and fifty dollars, on the agreement and conditions appearing in the following deed.

"Know all men by these presents, that whereas a certain *Baltzer Kunkle*, late of *York* county in the state of *Pennsylvania*, in and by his last will and testament, dated the seventeenth day of *July*, in the year of our Lord one thousand eight hundred and twelve, bequeathed a certain share or portion of his estate to his daughter, *Anna Mary*, to be retained by his executors until they should lay out the same in land for her sole use, and the said executors, to wit, *Christian Kunkle* and *Christian Gingrick*, being desirous to lay out the said share in lands, according to the direc-

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tions of the said will, for the use of the said *Anna Mary*, therefore the said executors have appointed the said *Anna Mary* and her husband, *John Bixler*, their agents, for the express purpose of purchasing land in the state of *Virginia*, for the use and purpose aforesaid, and paid into the hands of the said *Anna Mary* and *John Bixler*, their agents as aforesaid, the sum of fifteen hundred and fifty dollars, lawful money, for the sole and express purpose of laying the same out for land, for the said *John Bixler* and *Anna Mary*, his wife, who hereby acknowledge the receipt of the same, and acquit and for ever release the said *Christian Kunkle* and *Christian Gingrick*, their heirs, executors, and administrators, of and from the same, and of and from all claims and demands on account of the same, and of any thing coming or to come to the said *Anna Mary* and all persons claiming under her, out of or on account of her share, legacy, or bequeathment, under her father's last will. And further, the said *John Bixler* and *Anna Mary* his wife, promise and undertake, to lay out the said monies in lands for the use of the said *Anna Mary*, as soon as may be, not delaying longer than three months from the date hereof, and the title of the land purchased with the said money, shall be taken to and in the name of the said *Anna Mary* alone, and for her sole use to her and her heirs for ever, in the way and manner directed in and by the said last will; and, on failure of the money being laid out as aforesaid, for the space of three months from this date, then the said *John Bixler* promises and covenants to repay the whole of the said sum of money to the said *Christian Kunkle* and *Christian Gingrick*, without further delay. And the said *Anna Mary* and *John Bixler*, in consideration of the premises, grant, bargain, and sell, to the said *Christian Kunkle* and *Christian Gingrick*, and to their heirs, administrators, and assigns, all their, and each of their right, title, interest, claim, and demand whatever, under the will of the said *Christian Kunkle*, deceased, to hold the same and any part thereof, free, clear, and released, and for ever discharged of and from all claims and demands whatsoever of them, the said *John Bixler* and *Anna Mary* his wife, and each and either of them, so that not any of them shall hereafter have, make, or allege any right, claims, or demands for, or on account of any thing mentioned, devised, or bequeathed, in the said will. In testimony whereof, the said *John Bixler* and *Anna Mary* his wife, have hereunto set their hands and seal this 2nd day of *April*, in the year of our Lord one thousand eight hundred and sixteen.

"Signed, sealed, and delivered

in the presence of

"*Jacob Heckert, jr.*

"*Daniel Heckert.*

John Bixler, (Seal.)

Anna Mary Bixler, (Seal.)

"We acknowledge that we have received, on the day of the foregoing instrument of writing, fifteen hundred and fifty dollars,

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for the purpose of laying out the same in land according to the provisions of the foregoing instrument of writing.

“Witness,

“*Daniel Cauffman,*

“*John Danner,*

“*John Bixler,*

“*Anna Mary Bixler.*

“*York county, S. S.*

“Be it remembered, that the within named *John Bixler* and *Anna Mary* his wife, came before me, one of the justices of the peace in and for the said county, and acknowledged the foregoing instrument of writing to be their act and deed. The said *Anna Mary* being of full age, and by me examined separate and apart from her husband, and the contents of the foregoing instrument of writing being first made known to her, declared that she became a party thereto of her own free will and accord, and that she signed the same, and with her seal sealed it as her act and deed, without any coercion or compulsion of her said husband. In testimony whereof, the said justice has hereto set his hand and seal on the day of the date of the within instrument of writing.

“*Daniel Heckert.*”

At the time of the execution of the above deed of release, &c., *Bixler* and wife resided in *Virginia*.

On the 8th of *April*, 1816, there was purchased of *John W. Bronaugh* and wife, a tract of land of one hundred and fifty acres in *Fairfax* county, *Virginia*, for the consideration of three thousand three hundred dollars, and by deed of that date, the same was conveyed to *Anna Mary Bixler*, and her heirs for ever, and the said land and rents, issues and profits thereof, were held and enjoyed by her; and in that purchase the one thousand five hundred and fifty dollars were applied.

The widow of the testator died in 1825. The share of *Anna Mary Bixler* under her father's will, as appeared by the administration account of the executors, was one thousand four hundred and forty-eight dollars and eight cents, over and above the one thousand five hundred and fifty dollars, paid as aforesaid, exclusive of interest; but including *Anna Mary's* one sixth part of the five hundred pounds to be divided on the death of her mother.

The following notice, &c., were made part of the case:

“To *Christian Gingrick* and *Christian Kunkle*, executors of *B. Kunkle*:

“You are hereby notified, that I am employed as the attorney for *Anna Mary Bixler*, formerly *Anna Mary Kunkle*, to demand of you the performance of the trust created by the last will and testament of *Baltzer Kunkle*, by purchasing land for *Anna Mary Bixler* with her legacy, according to the directions of the will of *Baltzer Kunkle*. A part of the money now in your hands for her use has been a long time due, and a part has become

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due since the death of her mother. If you refuse to apply her money for her use as the will directs, a suit will be brought against you to collect the money itself.

“*E. Chapin*, Attorney at Law.”

July 12th, 1826, Mr. *Chapin*, agent or attorney for Mrs. *Bixler* of *Virginia*, called on Mr. *Christian Kunkle* to know whether he was willing to pay Mrs. *Bixler* the legacy due her yet before and since the death of her mother, in cash or in land without further trouble. His reply was—“No. Any thing you will get, you will get by the law;” and, “push away.”

The same evening he called on Mr. *Christian Gingrick*, stated to him his business, and read him a copy of this paper. Mr. *Gingrick* replied that he had nothing to do with Mrs. *Bixler*, that they had paid her off.

It was admitted, that on the first day of *April*, A. D. 1819, demand was made by the son of the plaintiff, with an order from *Anna Mary Bixler*, for a balance alleged to be due; also on the 1st day of *April*, 1820, and on the 15th of *July*, 1822, at which said several times defendants refused to pay any thing.

If, upon the above statement of facts, the court should be of opinion that the plaintiffs are entitled to recover the principal and interest of the share of *Anna Mary Bixler*, then judgment to be entered for the amount of the same in their favour. If the court should be of opinion that the plaintiffs are entitled to recover the interest, then judgment to be entered for the amount of the interest. If the plaintiffs are not entitled to recover, then judgment to be entered for the defendants.

The suit was brought to recover the aforesaid sum of one thousand four hundred and forty-eight dollars and eight cents, with the interest thereon; that being the difference between the amount of *Anna Mary's* full share, and the sum paid by the executors at the time of the release.

The court below gave judgment for the plaintiffs for the amount of the interest.

Opinion of Judge BRADFORD.—This was an action of *assumpsit* for two thousand dollars, for money had and received by the defendants to the use of the plaintiffs. The facts are to be taken as in the case stated in the nature of a special verdict. On this verdict several questions have been raised for the consideration of the court. The plaintiffs found their claim on the will of *Baltzer Kunkle*, deceased. That part which is most material, is as follows:—“After the hand money and the money of my personal property is all equally divided, it is my will, that the yearly payments of my said yearly estate, shall be divided as follows—The first bond or payment coming due, my son *Christian* and my daughter *Maria Elizabeth* shall get; the second, *Catharine*, intermarried with *Jacob Coleman*, and my executors in the room of my daughter

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Anna Mary; and the third bond, my daughter *Eve*, intermarried with *Christian Gingrick*, and the heirs of his son *Jacob*, deceased, and so on in rotation, until the whole of the money of the said bonds is paid off: they, my said executors, are to draw my said daughter, *Anna Mary*'s whole share, until they can purchase real property with the same for her use, as her husband, *John Bixler*, shall have no share of the same."

The plaintiff seeks to compel the entire execution of the trust, created by the clauses of the will, contending, that the defendants having neglected and refused to invest the balance of monies in their hands, in land, for her benefit, she is entitled in this action to recover the principal and interest, in her capacity of *cestui que trust*. Having no court of chancery, we are urged to extend adequate relief to the plaintiff in this form of action.

If it conclusively appeared that there was no other resort for the plaintiff, and that if this action was not sustainable, she would be without remedy, I would endeavour to reach the justice of the case by its adoption. Small violences done to the common law form of action, would be of trifling import, if the end would be the substantial justice of the case.

I have examined the *Pennsylvania* decisions having any bearing on this subject, and the result is unfavourable to the plaintiff on this point. In chancery, the obvious course of proceeding would be, for the plaintiff to file a bill, praying that the defendants should be compelled to execute the trust, agreeable to the will, and to account for the fund received. This would afford full and complete relief to the plaintiff on all parts of the case. The mode of proceeding here should be closely assimilated to the bill in chancery. This might be done by a declaration, setting out the will of *Baltzer Kunkle*, deceased, the amount of monies which have come to the executors' hands, which ought to have been invested in land for the plaintiff's use, the omission and refusal to effect the investment, and the damage done the plaintiff thereby. This would have formed a record, bringing the real case before the court. On a verdict being found for the plaintiff, conditioned to be void on complying with the provisions of the will within a reasonable specified time, an appropriate decree might be rendered. If this would have been the correct exclusive course of proceeding, to compel the execution of the trust, the form adopted, so far as relates to the principal fund, is defective.

In *Pennsylvania*, courts hold themselves bound to administer equity in all cases where the forms of law do not restrain them. *8 Serg. & Rawle*, 115. In *Jordan v. Cooper*, *3 Serg. & Rawle*, 578, 587, the Chief Justice says, "We have no court of equity. What then is to be done? We may do as is done in other cases where the forms of the common law are inadequate to the occasion: *we may form a declaration suited to the circumstances of the case*. I see no certain mode of doing equity to both parties,

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but by issuing a writ in the usual form, and permitting *the declaration to partake so much of the nature of a bill in equity, as to set forth the truth of the case.* To this the defendant may plead any thing which in law or equity will serve him; and thus the parties may go to trial on the merits of the case." *Ib.* 580. Justice GIBSON coincides, and says 'the plaintiff, addressing himself to the equitable powers of the court, ought to disclose such a case as will entitle him to equitable relief; but if he sets out such a case as will entitle him to recover at law, he ought to prove such a case as will entitle him to recover at law. The facts, as they exist, ought, in all cases where it is practicable, to be set forth.' *Ib.* 581.

Applying these principles to the declaration in this case, can we say that it contains any thing but the general requisites of a count for money had and received? Has the plaintiff disclosed such a case as entitles her to equitable relief; or has she only set out such a case as will entitle her to recover at law? If the latter, then we have seen she is to be confined to what the law permits. The declaration demands two thousand dollars in *assumpsit*; but the will directs that the principal fund shall not be paid to the plaintiff, but be applied to the purchase of land for her use. The money in the hands of the executors is not to be paid to the plaintiff: she cannot have it in that form: it would be a breach of trust to pay it to her. There is no express contract proved; and the law will not imply an *assumpsit*, which would be a breach of trust. The plaintiff is not entitled to take the fund out of the hands of the executors: the will gives them the custody of it, and directs the appropriation of it. But until it is appropriated, the plaintiff is entitled to the interest.

2. The release, executed by *Bixler* and wife to the defendants, of the date of the 2d of *April*, 1816, is set up in bar of the plaintiffs' claim, both as relates to the principal and interest of the fund in the executor's hands.

This release, having been made by *cestui que trust* to the trustee, will be operative for nothing more than what has been actually paid. Executors cannot be allowed to purchase in the trust fund for their benefit. Trustees must be kept within the line of their duty. A court of equity watches the conduct of a trustee with jealousy; and if he compounds debts or mortgages, or purchases them in at a discount, he shall not be suffered to turn the speculation to advantage. 1 *Johns. Ch. Rep.* The precise amount of the fund, at the time the release was executed, and what more was to be expected afterwards, was within the knowledge of the trustees; "And they cannot be allowed to use the information they obtain as trustees, to purchase in the trust fund for themselves." 3 *Atk.* 37. Courts will not construe a release as vesting any beneficial interest in the trustees. 1 *Serg. & Rawle*, 279, 280. 1 *Vez.* 9. 4 *Vez.* 129. 2 *Fonb. Eq.* 189.

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This release contains an express "grant, bargain, and sale," to the executors, of all the plaintiff's right, title, claim, and demand whatever, under the will of the said *Christian Kunkle*, deceased, evidencing a direct purchase of the trust fund for their benefit.

The principle which governed the court in *Say's Executors v. Barnes*, 4 *Serg. & Rawle*, 112, is applicable to this case. There it was held, that a receipt in full, given by a ward, when of age, to his guardian, was not conclusive, and did not stand in the way of a new settlement, although there was no concealment, fraud, or circumvention. The guardian was the trustee of the ward's funds, which he was bound to account for to the *cestui que trust*, the ward. "If he received less than he might, the guardian paid him no consideration for the loss." Here the trustees are in possession of a fund devised to a feme covert, and it is against equity for the defendants to retain money which came to their hands in their trust capacity, and for which they have paid no consideration. There is no evidence of any concealment but what arises from the nature and face of the transaction. Nor does it appear, on the contrary, that every thing relating to her father's will and estate was exhibited to the plaintiff's view. This is not the release of a debt due by the defendants to the plaintiffs, but a transfer of her father's bounty to trustees, who had the possession of it, without consideration, to a considerable amount. A great advantage has been taken of the plaintiff by the executors, and by the very persons who were bound to inform her of her rights. 1 *Yeates*, 312, notes.

3. Although on the pleadings in this case the plaintiff cannot have judgment for the principal fund, I think she may recover the interest. Whatever sum remains in the hands of the executors, which they have received in trust for the plaintiff, under the terms of the will, they should pay the interest of. The interest is to be ascertained to the time of bringing the action. Executors and other trustees are chargeable with interest, if they have made use of the money themselves, or have been negligent, either in not paying over the money, or in not loaning or investing it, so as to render it productive. The time for which interest is to be charged in case of negligence, varies according to circumstances. Six months from the time the money was received is a reasonable period in most cases from which to charge interest against a trustee. 1 *Johns. Ch. Rep.* 508.

The interest here is payable for the time the money came to the executors hands. The words of the will are, "paying to her, for her use, the interest of her said share, until they can purchase real property with the same for her use." Evincing the intention of the testator, that the interest of the money should commence from the time it was received by them; if not immediately able to appropriate it in land, to pay interest to the *cestui que trust*. The will gives this legacy to the wife in the shape of interest, for her

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use: it is not on a footing of a charge of interest on the executors, for their negligence in not putting the fund to interest, or for using it themselves. In such cases interest would be chargeable from a reasonable period after receipt, which the executors would have to invest the money in land.

It being the opinion of the court that the interest only is recoverable in this action, we, also, think that the suit for it has been correctly brought in the name of *Bixler* and wife. The writ and declaration is, "*Bixler* and wife in right of said wife and for the use of said wife." The money, when recovered, will be under the control of the court, who will see that it comes to the hands of the wife. If the husband should receive it he will be held a trustee for the use of the wife, and she may dispose of it as she pleases. 6 *Serg. & Rawle*, 467. The wife has power to release this accruing interest, devised to her separate use, and might have appointed her husband to receive it if she pleased. 1 *Pet.* 116. 1 *Serg. & Rawle*, 275. She may, therefore, join him in a suit, for this claim, thus complying with the law, by putting a responsible person on the record for costs. The action, according to the case cited in 6 *Serg. & Rawle*, 466, could be brought in the name of the husband and wife, and the husband could not release or discontinue the action. It might, as in the case of an irregular assignment of a chose in action, have been entered for the use of the person having the beneficial interest, the wife. 10 *Serg. & Rawle*, 210. Had this action been brought by *prochein ami* of the wife, the last book cited shows, that it would have been bad on a plea in abatement. It was therefore correct to join the husband and wife as has been done in this case.

We give judgment for the plaintiff for the interest which occurred on these sums, which ought to have been invested in land, for the benefit of the plaintiff, down to the time of the commencement of this action, which, according to the documents submitted to the court, amounts to four hundred and seventy-five dollars and ninety-five cents.

Each party took a writ of error.

Durkee, for the plaintiffs in error.—If the plaintiffs cannot, by a suit at law, compel the executors to do justice, they are without redress altogether. The defendants are not permitted to hold the money under pretence of a trust which they have constantly denied. On behalf of my clients, I assent to any condition which the court may impose to protect the separate interest of Mrs. *Bixler*. In further answer to the objection, that the money was not intended, by the will, to go into the hands of *John Bixler*, I may say, neither was it intended to be held for ever by the executors as their own. But this, I submit, is not strictly a trust. There is no trustee in the will, nor any provision for the appointment of one. The land, if purchased, is Mrs. *Bixler's* own, held in her own name, and she, with her husband, may dispose of it the next hour.

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So that if the money itself should be paid over to the plaintiffs without restriction, it would be but a performance in substance of the directions of the will. As to the form of the action, it is certainly as good for the principal sum as it is for the interest, both of which are claimed and held by the defendants as their own. Whoever, without a special contract, has the money of another, may be sued in *indebitatus assumpsit*. This is believed to be the general rule. It even lies to recover back money paid for an annuity not registered. The release is no impediment, procured, as this was, by a payment, to distant owners, of about half of their money, by those who would protect themselves under the name of trustees. The one thousand five hundred and fifty dollars, though not paid according to the will, we give them full credit for. He cited *Say's Executors v. Barnes*, 4 *Serg. & Rawle*, 112. 1 *Vez.* 9. 1 *Eq. Cas. Abr.* 384. 2 *Fonb.* 189. 1 *Johns. Ch.* 22, 36.

Wadsworth and Gardner, for the defendants in error.—We do not admit, nor does the record show, that one thousand five hundred and fifty dollars was all the money paid, by the defendants in error, to the plaintiffs. The scrivener who drew the release, a man of first-rate probity, is now dead. All the facts were well known then by the parties. At worst, the release is voidable only, not void, and is confirmed by an acquiescence and delay of so many years. Even were we to admit the trust, and to admit that it is unexecuted, still the testator, who had a right to give the law to his own donation, and impose what terms he pleased, has expressly left it to the judgment of the executors when to purchase. If the plaintiffs cannot insist upon the money itself, then it goes into the hands of *John Bixler* in spite of the very words of the will under which he claims. But the action is wrong brought. *Assumpsit* for money had and received lies not against an executor as such, on his own receipt. There is nothing like it in the law of *England*, or of this country. 6 *Com. Dig.* New Ed. *Pleader*, 2 *B.* 2. *Clark v. Herring*, 5 *Binn.* 33. Besides, the declaration should be special. Here are no facts of the case set forth: no means of notice to the defendants: no memorial which, in the case of a recovery, will show the debt paid, and be a protection against another suit for the same cause. The point is expressly decided in *Jordan v. Cooper*, 3 *Serg. & Rawle*, 564, that to support a merely equitable claim, the facts which are alleged to constitute the equity, must be set out in the declaration. If the plaintiffs have a right to sue in any form, they must begin by a removal of the trustees under the act of 1825, Pamphlet edition, page 107. Where an act of assembly prescribes a remedy, it supersedes all other rules, whether of equity or of the common law, and must be strictly pursued.

The opinion of the court was delivered by

TED, J.—On the merits of the cause, as well as on the form of

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action and mode of redress, I am in favour of the plaintiffs. I think they are entitled to judgment for the whole debt and interest.

The release having been obtained from strangers residing in another state, obtained by executors and guardians, whose duty it was to protect the woman from imposition, gotten from her after they had sold all the testator's lands, and well knew that they were paying to her but little more than half of her just share, is nothing. Such a release, thus gotten, is condemned by every case in the books. It is good for one thousand, five hundred, and fifty dollars, the money actually paid, and for no more.

Then, there is in the hands of the defendants a sum of money, amounting with the interest computed to the time of the trial, to one thousand, nine hundred, and forty-three dollars, and eighty-three cents. The defendants claim it as their own, having denied the trust, and still persisting in their denial. But their claim is most groundless; and the plaintiffs are entitled at least to the use and benefit of the money, in some mode beyond all doubt. In a case of such manifest wrong, there must be some remedy. We have no Court of Chancery to compel the defendants by attachment to purchase land for Mrs. *Bixler*. There is no court in the state that can use any compulsion in the case, except by issuing an execution for the money. One objection is, that these executors are trustees, and redress ought to be had by removing them and getting others appointed by this court, under the act of the 22d of *March*, 1825, (*Pamph. p. 107*), or by the Court of Common Pleas, under the act of the 14th of *April*, 1828, (*Pamph. p. 453*.) Those acts of assembly appear to me wholly inapplicable to the present case. Here is no accident of death, infancy, lunacy, or other inability of a trustee. Nor can a trustee's pocketing the trust money as his own be in any possible shape considered as a renouncing or refusal to act. Nor could it ever have been intended that this court, or the Court of Common Pleas should, without a jury, pronounce a man a trustee of money which he claims to hold as his own. Even supposing new executors appointed, who, finding the same advantage to themselves, should insist on the same pretence of title, where would be the end, or how much nearer would these plaintiffs be to obtaining justice than they were when they began? Besides, what would be the situation of an estate, where an executor should be removed from his office as to one of the children and legatees of the testator, and continue executor as to all the rest? Further, we have a plain act of assembly, (*3 Sm. L. 296*), directing how and for what reasons executors may be removed from their office, not by us, but by the Orphans' Court,—and not even by that court in any case whatsoever, provided they are willing and able to give security.

To the argument that this demand is founded on mere equity, and cannot be enforced by any form of action of the common law, I would say that ever since the time of *Kennedy v. Fury*, (*1 Dall.*

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72,) in which a *cestui que trust* maintained an ejectment in his own name, and I believe long before, mere equitable rights have been every day recovered in our courts: It seems to me that the rules of equity have, by immemorial usage, become rules of property in our state, and cannot, I apprehend, be now departed from without legislative authority. Cases need not be cited to show how rights purely equitable have been sued for with success in the forms of action known only to the common law, and how relief has invariably been granted wherever it could be granted in any way consistent with those forms; generally by the courts with the aid of a jury,—often without. Not only have conditional judgments repeatedly been given, but in the lessee of *Matthews v. Akewright*, (2 Binn. 93,) the court, on a general verdict for the plaintiff, and judgment thereon, ordered a stay of execution until the defendant should be secured in his title to another piece of land according to an article of agreement. In the case of *Morris's Executors v. McConaghy's Executors*, (2 Dall. 189, 1 Yeates, 189,) the court, on motion, directed a contribution among the several holders of lands bound by the same mortgage.*

As to this money going into the hands of *John Bixler*, the husband, against the express directions of the testator, it is by no means necessary that the money should go into his hands; and if it were to go into his hands, the objection, perhaps, could not very fairly be made by these executors, who, by holding it ten years as to part, as their own, and denying the trust, have left the legatee no choice but to submit to the injustice, or to sue in the only way in which the law permits her to sue jointly with her husband. It will not follow from this opinion, that in every case of a legacy guarded like the present, and to be laid out in land, there can be a recovery of the money itself by an action. Here are many special circumstances. The great length of time—the obstinate denial of the executors—their claim of property—the grossness of the advantage which they attempted by procuring the release—the fact that *Bixler*, the husband, has already honestly laid out, not only all that he received from the executors, but one thousand seven hundred and fifty dollars more of his own money, in purchasing land in the name of his wife, to be held as her own according to the very letter of the will, and his offer here by his counsel, to let the money in question remain in court, to be laid out in the same way. All these things combined, seem to make the plaintiffs' claim irresistible.

It is argued that *assumpsit* will not lie against executors, as such, for money had and received by themselves: nor will it. But here the naming the defendants executors in the writ, is mere surplusage. The judgment is against them, *de bonis propriis*, and rightly so. This very point came before the court, and was decided in *Ruble's Executor v. Boileau (in error)*, 10 Serg. & Rawle, 208; and the same decision had been before given upon the same point

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in *Wilson v. Wilson*, 3 Binn. 557. I refer also to *Gratz v. Simon's Executors*, 1 Binn. 588, and *Crotzer v. Russell*, 9 Serg. & Rawle, 78. It is a common mode of suing for a distributive share of the personal estate of the decedent. Yet perhaps it would be much better not to name the defendants, in such cases, as executors or administrators. It would avoid many difficulties, and much uncertainty, as to what judgments are binding upon the estate of the decedent. The form of the count is objected to, being general *indebitatus assumpsit*. It must be confessed that, at first view, the observations, in *Jordan v. Cooper*, 3 Serg. & Rawle, 580, of TILGHMAN, C. J., as also of GIBSON, J., appears exceedingly strong against this form of declaration. But it now strikes me that those observations must be understood as referring exclusively to the action, then in hand, of special covenant, and to other similar cases. Here the money in dispute actually has been received by the defendants. In *Miller v. Ord*, 2 Binn. 384, a case depending altogether upon equity, and upon very complicated facts, this identical objection was urged by Mr. Dallas, and overruled by the court: TILGHMAN, C. J., delivering the opinion, and declaring general *indebitatus assumpsit* to be a count well calculated for the recovery of equitable demands: that in this state, where there is no Court of Chancery, they were bound to encourage those forms of action by which equity may be attained; and that to prevent surprise, from want of notice of particulars, it was the defendants' business to demand a specification. But, supposing *Miller v. Ord* to be overruled by *Jordan v. Cooper*, which I do not believe, yet there appears another conclusive answer to the objection. We are deciding upon a case stated. The declaration is not before us. It is waved and superseded. The parties have agreed to put, and actually have put before us the facts of the case. True, the counsel did reserve their exceptions. But it is a reservation incompatible with the agreement. They cannot, at the very time they are placing all the facts specifically upon the record, object because the facts are not specifically upon the record. It is an attempt to mix a special demurrer with a case stated. It is without precedent. It can be subservient to no one purpose of justice or law, nor productive of any thing but delay and vexation, thus to entangle the merits of a cause with points of form relative to the wording of a declaration which both parties have agreed to set aside. In all but this one matter I concur most heartily in the opinion delivered by the judge of the court below. The opinion of a majority of the court is that the judgment for the plaintiffs below and plaintiffs in error be reversed, and judgment be entered for them for the use of the plaintiff, *Anna Mary*, in the sum of one thousand nine hundred and forty-three dollars and eighty-three cents. And, with the consent of the said plaintiffs, by their counsel it is ordered that the money aforesaid be paid into the court below, to be laid out, under the direction of the court, in the purchase of

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land, for the said *Anna Mary*, according to the last will and testament of her late father, *Baltzer Kunkle*, deceased.

GIBSON, C. J.—This action was brought by *Anna Mary Bixler* and her husband, to recover a legacy bequeathed by her father to the defendants, his executors, in trust, to lay the same out in land for her use, paying her the interest in the mean time, as, to use the words of the testator, “her husband, *John Bixler*, shall have no share of the same.” In pursuance of the trust, the defendants laid out fifteen hundred dollars in land; but having succeeded in procuring a release from the plaintiffs, now set them at defiance. This release is conceded to be void, and the question is whether the plaintiffs are to have judgment for the principal remaining in the defendants’ hands, or only for the interest.

A breach of trust is not necessarily a forfeiture of the trustees’ right to possess and manage the fund. But one of two things then remains to be done;—either to take the fund into the hands of the court, and cause it to be invested according to the terms of the will, or suffer it to remain in the hands of the defendants during the husband’s life, compelling them to pay interest pursuant to the directions of the testator. The latter is altogether practicable, and in strict accordance with the will, while the former cannot be accomplished without exercising powers which have not hitherto been assumed by any court in *Pennsylvania*. It would be but another step formally to entertain a bill for specific execution. A power to decree a trust, or a contract specifically, would, no doubt, be a most salutary one; for the very case before us is an instance of the impotence of attempts to give entire effect to the principles of equity while trammelled with common law forms. Yet in the whole course of our juridical history, there is not an instance of an attempt to cast these forms off. The legislature have gone on the admitted principle, that forms of procedure, in derogation of the common law, cannot be adopted without a legislative grant, and that the constitution was framed on the same principle, is apparent from the clause which limits the chancery powers of the present courts to certain specified objects. It seems to me, therefore, we can give the plaintiffs nothing more than the interest, leaving the principal in the hands of the defendants, pursuant to the directions in the will.

HUSTON J. concurred with GIBSON, C. J.,

Judgment reversed, and a different judgment entered, as stated in the court’s opinion.

[LANCASTER, JUNE 3, 1828.]

BOULDEN *against* HEBEL.

IN ERROR.

An attorney who has a contract with a party for a certain sum as a fee in case of recovery, is a competent witness for him if it does not appear that the contract is under seal or capable of being enforced.

The plaintiff's attorney having in his hands a sum recovered by suit on a bond, the plaintiff and H., by writing under seal, certified, that they had settled all matters in variance respecting the bond left in the hands of the attorney for collection, and had agreed to divide the sum equally: the plaintiff's attorney, notwithstanding this agreement, is not bound to pay half the money to H.

ERROR to the District Court for the city and county of Lancaster.

Wright and Porter, for the plaintiff in error.

Parke, contra.

The opinion of the court was delivered by

SMITH, J.—*Conrad Hebel*, defendant in error, brought an action in the District Court of the city and county of Lancaster, for money had and received against *Nathan L. Boulden*, in which a verdict and judgment were, on the 13th of February, 1826, rendered for the plaintiff, for three hundred and forty-nine dollars. A certain *Philip Mays*, assignee of *Elizabeth Heidelbaugh*, had placed in the hands of *Nathan L. Boulden*, an attorney at law, a bond due from *Jacob* and *John Heidelbaugh*, for collection, on which a judgment was obtained the 25th of March, 1822, for six hundred and fifty six dollars and seventy-five cents, in the same court. On the 26th of November, 1822, *Boulden* received from the defendants two hundred dollars, and, on the 15th of May, 1823, the further sum of four hundred and twenty-dollars on this bond. On the 16th of May, 1823, he paid the amount due on the bond to the said *Philip Mays*. *Philip Mays* and *Conrad Hebel*, on the 23d of November, 1822, executed the following agreement, under their hands and seals, in the presence of *G. Withers*, to wit: "We, the within subscribers, do certify that we have settled all matters in variance respecting the bond left in the hands of *Nathaniel L. Boulden*, Esq., for collection, and have agreed that each of us pay one half the costs, and divide the amount of the bond and interest equally. Witness our hands and seals this 23d day of November, 1822.

His

Conrad X Hebel, (Seal.)
mark.

His

Philip X May, (Seal.)
mark.

Witness present,
G. Withers."

(Boulden v. Hebel.)

George B. Withers, attorney for *Conrad Hebel*, on the 24th of May, 1823, served a written notice on *Nathan L. Boulden*, in the following words: "*Philip Mays*, assignee of *Elizabeth Heidelbaugh*, against *Jacob Heidelbaugh*, and *John Heidelbaugh*, District Court, December term, 1821, No. 18, Lancaster, May 24th, 1223. Sir,—Take notice that we claim the one half of the judgment in the above cause, as by agreement entered into between the above *Philip Mays* and *Conrad Hebel*. You will therefore not pay over the amount to which the said *Conrad Hebel* is entitled, as we hold you responsible for the same. *George B. Withers*, attorney for *Conrad Hebel*. *Nathan L. Boulden*, Esq."

At the trial, seven bills of exceptions were tendered to, and sealed by the court, and the decisions upon these exceptions have been assigned for error in this court. But it was admitted on the argument, by the plaintiff in error, that all the errors assigned in the opinion of the court below, on the exceptions to the testimony, and in their charge to the jury, presented only two questions for the decision of this court. These will be considered and decided. The first question is, was the court below correct in admitting as a witness, *George B. Withers*, the attorney of *Conrad Hebel*. Mr. *Withers* and his colleague, had made an agreement in writing, (not produced,) with *Conrad Hebel*, by which they were to receive forty-five dollars each, if they recovered the money from *Nathan L. Boulden*; but, as there was no evidence that this agreement was under seal, or such a contract as could be enforced against their client, the objection to the admission of Mr. *Withers*, falls within the principle of the decision of this court, in the case of *Miles v. O'Hara*, 1 Serg. & Rawle, 32. It was an objection to the credit and not to the competency of the witness. The District Court, therefore, properly admitted him.

There was no error in admitting the testimony contained in the second, third, fourth, fifth, and sixth bills of exceptions. The evidence therein mentioned was correctly admitted, to show that *Boulden* had received the money. The other question submitted to this court, grows out of the agreement between *Philip Mays* and *Conrad Hebel*, and the construction given to the same by the District Court, in their charge to the jury. Was *Nathan L. Boulden*, the attorney who conducted the suit and collected the money for *Philip Mays*, justifiable in paying it over to the client by whom he was employed, notwithstanding that agreement; or was he compellable, by reason of the agreement, to pay it to *Conrad Hebel*? The law as to agents, is not generally applicable to attorneys: the relation of the latter to their clients and the court, renders their authority and responsibility peculiar in many respects. It is of an intimate and a highly confidential character; so much so, indeed, that the acts of the attorney in the suit, will bend his client even to his prejudice, nor will the court look beyond the attorney

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to his authority. *Denton v. Noyes*, 6 Johns. Ch. Rep. 296. His fidelity, on the other hand, is secured by the obligation of an oath, and the power of the court to inflict summary censure and punishment. The court regard him in the light of an officer attached to their jurisdiction, no less than as the intimate representative of the party for whom he appears before them. It would be inconsistent with the duties of his situation, and the necessary economy of courts of justice, to subject the attorney at law, to the inconvenience of trying, in a suit against himself, the rights of different claimants, to money which he had recovered for his client.

In this agreement, there is no reference to *Nathan L. Boulden*, except for the purpose of designating the bond, concerning which the agreement was made. All that it requires, was to be done by the parties themselves. It contains no directions or request to him. On its face, it imports a division of the money when collected; not an assignment of the bond, nor an agreement that *Hebel* should receive the money from the attorney. It does not appear that the agreement, or a copy of it, was ever exhibited to *Boulden*; and I cannot conceive how it is possible to consider it as an order to him to pay over one half of the money recovered, to *Conrad Hebel*. But if *Philip Mays* had actually given an express order for the money, and before the same was accepted had directed *Boulden* not to accept or pay it, the latter would have been justified in not paying it. Nothing is more common than for a man to tell a creditor, "I have sued for money, and when it is collected I will pay you." If, on such a promise, with notice to the attorney, he could be subjected to an action by the creditor, it would lead to confusion, and make the situation of an attorney at law exceedingly embarrassing. To the agreement in this case, *Nathan L. Boulden* was neither party nor privy; nor did he enter into any engagement relative to it, by which any legal obligation or liability on his part accrued, to sustain the action of *Conrad Hebel* against him.

The court below, in charging the jury, that a payment by him to *Philip Mays*, after the agreement in question and notice thereof, would not exonerate him from his legal obligation to pay *Conrad Hebel* so much as he was entitled to under the agreement, erred. *Conrad Hebel* was not entitled to any thing from *Nathan L. Boulden*. The judgment must therefore be reversed, and a *venire facias de novo* awarded.

Ton, J.—I agree with the majority of the court, that the decisions of the judges below, were correct in all the six bills of exceptions taken by the defendant below to the plaintiff's evidence. Clearly, on the first exception, *George B. Withers* was a legal witness. Being put by the defendant on his *voir dire*, he swore that he had transferred his interest in the fee to the other attorney of the plaintiff, Mr. *Park*; that he had ceased to be counsel in the

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cause: that he did not expect to receive, and never would receive any part of the fee; and that he had no interest in the case. If he swore the truth (and there was no reason laid before the court to doubt it,) he was a competent witness.

2nd Exception.—The agreement between *Mays* and *Hebel*, of the 23rd of *November*, 1822, and the notice to *Boulden*, were unquestionably, evidence. They constituted the plaintiff's title.

As to the third, fourth, fifth, and sixth *exceptions* by the defendant below to the evidence, the notice was evidence. The record of the suit, *Mays, Assignee of E. Heidelbaugh, v. Jacob and John Heidelbaugh*, was material to show that the money in question had been recovered, and to identify the plaintiff's claim. *Boulden's* receipts for two hundred dollars and for four hundred and twenty dollars, were not legal evidence only, but indispensable. *Boulden's* acknowledgment after suit brought, that he had not in fact paid over the money to his client, was rightly admitted, beyond a doubt. So, any declaration by him upon the subject either before or after the suit. As to offering an indemnity to *Boulden*, none appears to have been asked for. And as to interest, clearly, if in a case of this kind the plaintiff makes out his title to the principal, there can be no error in allowing him the interest also. So far, as I take it, we are all agreed there is nothing erroneous.

On the residue of the case, I am obliged to dissent from my brethren. The court below charged the jury in substance:

1st. That the agreement of the 23rd of *November*, 1822, amounted to an equitable assignment of the money in question; and, that if *Boulden* had notice of it before he paid the money to *Mays*, and if a demand was made under it by *Hebel* or his agent, while the money was in *Boulden's* hands, then paying over after that time to his client will not exonerate *Boulden*, the attorney, from his legal obligation to pay to *Hebel* so much as he is entitled to under the agreement. But that, if the jury believed that the money had been paid over by *Boulden* to *Philip Mays*, on the 16th of *May*, 1823, according to the receipt on the bond and the evidence of *Kitty Mays*, and that no notice had, before that time, been received by the defendant, of the agreement between *Mays* and *Hebel*, then the defendant, *Boulden*, was entitled to their verdict.

2nd. The court charged the jury, that the defendant below was not exempted from any obligation to pay to *Hebel* the money in question, on account of having collected it in his capacity of attorney at law for *Philip Mays*. Was the court right on these points of law?

The agreement, the foundation of the suit, is in these words:—

“We, the within subscribers, do certify, that we have settled all matters in variance respecting the bond left in the hands of *Nathan L. Boulden, Esq.*, for collection, and have agreed that

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each of us pay one half of the costs and *divide* the amount of the bond and interest equally. Witness our hands and seals, this 23rd day of *November*, 1822.

"Witness present,
"G. Withers.

His
"Conrad \times Hebel, (Seal.)
mark.

His
"Philip \times Mays, (Seal.)
mark.

It would thus appear that the bond which had been informally assigned to *Philip Mays*, was not exclusively his property, but belonged in part to *Conrad Hebel*. In ascertaining whether the charge of the court was correct, it is material to consider the case as it was put before the jury by the parties. No proof appears to have been given, or attempted on the trial, to show that the agreement of the 23rd of *November*, 1822, was not genuine, and known by *Boulden* to be so; nor to show any imposition practised upon *Mays*, nor to show any ground of suspicion against the fairness and justice of *Hebel's* title to one half of the money; nor that *Boulden* disputed the formality of the paper at the time of the demand, or required further directions from *Mays*, or claimed to retain for costs, or claimed an indemnity. *Boulden's* sole defence on the trial, I mean his sole defence as far as respects matters of fact, appears to have been, that previous to the notice of the assignment, he had paid over the whole money to *Philip Mays*, his client, as in duty bound; a most invincible defence if made out. In order to make it out, *Boulden* produced a receipt in full from his client, dated the 16th of *May*, eight days before the notice by *Hebel*: also a witness, the daughter of *Philip Mays*, who swore she was present when the receipt was given and the money paid. This receipt, if true and honest, was conclusive of the whole cause, and so admitted to be by *Hebel's* counsel, as far as I can see from the record, and certainly so decided by the court. But *Hebel* contended that the receipt was untrue not in date only but in every thing else; that so far from paying the whole money at the date of the receipt, *Boulden* had paid no part of it down to the time of bringing the suit, and that the writing had been fabricated, date and all, for the sole purpose of depriving him, *Hebel*, of his money. Now it is impossible for me to imagine how the court below could have done better with the cause, than to put it to the jury upon the same grounds upon which both the parties, by their proofs, had put it to the jury. Whether the verdict was right or wrong we cannot inquire, nor know. A verdict, approved by the court that tries the cause must settle contested facts. Under this charge of the judge, the jury must be taken to have decided the fact conclusively, that *Boulden* either never did pay over the money to his client, or paid it over after he had full notice, that by a

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fair title, one half of it had become the property of *Conrad Hebel*. Then, if the charge of the court was correct, there is an end of the case. The court told the jury that the paper of the 23rd of November, 1822, was in effect an assignment. Now, I agree the word "assign," is not in that paper. But I hold that no such word is necessary. Nor any other particular form of words. I believe, if the transfer or contract had been by parol only, it would have been good against *Boulden*, if he knew it, and knew that the money belonged to *Hebel*. But here was a minutely written description of the property, with an acknowledgment of the right and title of *Hebel* under the hand and seal of *Mays*, and in the presence of a witness subscribing. The recovery of it neither was nor could be misunderstood by *Boulden*. Many land titles are held by documents much slighter and more conclusive. It is immaterial whether we call it a declaration of trust or an equitable assignment. If the transaction was honest and fair, *Mays* was bound by it, and so was *Boulden*. It could not be defeated by any act of one or the other. *Mays* could not again dispose of the same money. On his insolvency, his assignees would have no title to it. If he absconded, it could not be touched by attachment. If he died, it would not become assets.

In equity, even debts may be assigned by parol. 2 *Com. Dig. Chancery*, 2, H. An assignment by the clerk of the peace to creditors under an insolvent debtor's act, need not be under seal, that being considered an unessential formality, though required by the statute. 2 *Atk.* 242.

A. indebted to B., gives him a draft on a fund due to him, A., out of the exchequer, decided to be a valid assignment, and it prevailed against the assignees of A., who became bankrupt immediately after. *Row v. Dawson*, 1 *Vesey*, 331. A gift of a bond passes the equitable interest. 3 *Atk.* 214. And in *Sharpless v. Welsh*, decided at *Nisi Prius*, by judges SMITH and BRECKENRIDGE, 4 *Dall.* 279, it was held that a mere private letter to a friend proposing a division of the proceeds of a bill of exchange among certain creditors, was a valid equitable transfer of the money afterwards received, and sufficient to cut out a foreign attachment; which had been laid upon the fund not only before the creditor had agreed to the distribution, but before he had seen or heard of the title.

In *Wakefield v. Martin*, 3 *Mass. Rep.* 558, it was decided, that the assignment of a debt, even without any notice, will overreach an attachment. And in the courts of equity in *England*, the same decision has been repeatedly made. I do not know that any case exists requiring a technical form of words for the assignment of a chose in action. In *Buchanan v. Taylor*, *Addison's Rep.* 155, held that an equitable assignment was valid, and indifferent whether the assignment was in writing, by parol, or by mere delivery of the evidences of right.

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Is there any thing in the fact of *Boulden* having received the money in the capacity of attorney, or agent, to distinguish this case and protect him from this suit? I apprehend not. On this head, to save time, I refer to the authorities apparently most conclusive, produced on the argument, and will not repeat any of them. That an attorney is not bound to look beyond his own employer, is a good general rule; but it is a rule which in equity, and in law too, is liable to many exceptions. He who delivers to an attorney a bond for collection, whether payable to himself or another, whether with an assignment or not, may fairly be presumed the owner. But, if he afterwards and before the money is paid over to him, is known not to be the real owner as to the whole, or as to part, or if he has sold it and got the amount from another person, or has in any way fairly disposed of it; or if it appears that he was only trusted to convey the bond to the lawyer, or that he picked the bond up in the streets, or defrauded some one out of it; or, if in any other possible shape, it appears that he never had an interest, or that the interest he had is vested in another person, then I do hold that the attorney, who knowing these things or knowing any one of them, shall yet go on, under an obligation of duty or without it, to pay money voluntarily to a man who is not the owner, may by the rules of law, be compelled to pay it over again to the man who is the owner. In *Dottin's Case*, 1 *Stra.* 547, the client had borrowed sundry deeds and delivered them to his attorney. The owner complained to the court; and nothing saved the attorney from an attachment, but his having given the deeds back again to his client before he knew that they were not the client's property. In the common case of an attachment of a debt in suit, I do not know that it has ever been imagined that the attorney of the plaintiff, after notice, could with safety pay the money to his client. Therefore, my opinion would be, to affirm the judgment.

Judgment reversed.

[LANCASTER, JUNE 3, 1828.]

KILHEFFER *against* HERR.

IN ERROR.

In an action on the case for the continuance of a nuisance in erecting a dam, a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, are conclusive evidence. That the defendant has discovered new evidence, not in his power at a former trial, forms no exception to the rule at law or equity.

But, in such action, the plaintiff, to avail himself of this conclusiveness, must take care not to waive it by pleading; as if the defendant plead a license, and the plaintiff does not, in his own replication, rely on the estoppel of the former judgment, but replies, no license, the jury are not precluded from inquiring in to the truth of the case.

In actions, however, of debt, *assumpsit*, &c., when special pleading is not required, the record of a former recovery is conclusive evidence, binding on the party, the court, and the jury.

THE plaintiff in error was plaintiff below.

The opinion of the court was delivered by

ROGERS, J.—This is an action on the case for the continuance of a nuisance, to which the defendant has pleaded not guilty, license, and the statute of limitations. Replication, No license, *actio non accrevit infra sex annos*, issues, and rule for trial. To maintain the issue on his part, the plaintiff gave in evidence, among other things, the record of a suit in the Common Pleas of Lancaster county, to the April term, 1815, No. 308, *Christian Kilheffer v. Benjamin Herr*, in which the pleas were not guilty, license, and the act of limitations, issue, &c. There were the same parties, the same pleas, and, it appears most satisfactorily to the court, the same matter in controversy. The defence relied on, in each case, rested on an indenture between *John Kilheffer* and *John Stoner*, which contains a license for the erection of a dam not exceeding the height of six feet seven inches, to be measured in the middle thereof from a certain rock, whereon the same now is, and stands erected and built. The location of this rock appears to have been the bone of contention in both suits. This defence, which, in all probability, would have availed the defendant, had the facts been known at the first trial, has been passed upon by the jury, who have negatived the defendant's plea by a general verdict for the plaintiff. The first question which presents itself is the conclusiveness of the record of the verdict in the first suit; and on this part of the case the court entertain no doubt. A verdict for the same cause of action, between the same parties, is conclusive; for when a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent suit, for the same cause, and between the same parties. It may be

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a great misfortune, as in this case, that from causes over which he had no control, the party may not have been properly prepared for trial. It is, however, a misfortune which this court cannot remedy, as the rule is settled on the principle, that there must be an end of litigation, and to provide against the loss of testimony, and as the defendant had an opportunity of showing the truth of the fact, he shall not afterwards be permitted to contradict a record to which he is a party. He is estopped to deny that which has been solemnly ruled against him. We shall, therefore, take it as settled, that the erection of the dam, complained of in the first suit, is not open to inquiry, in an action for the continuance of the nuisance. All the plaintiff was bound to do, was to give in evidence the former recovery, to prove, that the dam had undergone no alteration, but continued the same, and his right of action was complete. From a variety of cases, says Chief Justice DE GREY, in delivering his celebrated judgment, in the case of the Duchess of Kingston, relative to judgments being given in evidence in civil suits, it seems to follow as generally true, that the judgment of a court of competent jurisdiction, directly upon the point, is, as a plea in bar, or as evidence conclusive, upon the same parties, upon the same matter directly in question in another court. The verdict must be considered as conclusive between the same parties, in regard to the same matter; otherwise it would be, in effect, permitting one jury to review the decision of another. These principles are supported by the whole current of cases in *England* and in this country, as will be seen by reference to *Brookway v. Kinney*, 2 Johns. Rep. 210. *Rice v. King*, 7 Johns. Rep. 20. *Platner v. Best*, 11 Johns. Rep. 530. *Shelton v. Barbour*, 2 Wash. Rep. 64. *Preston v. Hamey*, 2 Hen. & Munf. 55.

In *Baxter and others v. The New England Insurance Company*, 6 Mass. Rep. 277, 286, the law is summed up in this manner: "This proposition I think to be universally true, that a person, in all cases is concluded by a decree, sentence, or judgment of a court of competent and exclusive jurisdiction, in a suit in which he was a party, in all future trials of the same question, and whether that question arises directly or collaterally, provided there be no contract between the parties to the contrary. It is conclusive, not only of the right which it establishes, but of the fact which it directly decides." This was established, and well known as a principle of *English* law at, and long previous to the revolution. The same principle was recognised in *Ross v. Heble*, 6 Serg. & Rawle, 57. Indeed, the doctrine does not seem to have been questioned; as it appears to have been admitted, that if the matter had been *res judicata*, it could not be reheard. To apply these cases to the present,—in the first suit, the point in contest was the license, alleged by the defendant for the erection of the dam. This was passed upon, and directly decided, and the defendant now seeks a re-examination of that question, on the ground of new-discovered

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testimony. It is said, that this is an equitable defence, and that a Court of Chancery would, in such cases, afford relief to the defendant; and it would have been well if the counsel had shown some authority to sustain the position. The truth is, a Court of Chancery cannot relieve against the law. They are as much bound by these principles as any other tribunal. Their jurisdiction is not an arbitrary jurisdiction, but is governed by precedent and adjudged cases; and however a chancellor may have lamented the misfortune of the defendant, in not having the necessary proof at the first trial, he could have afforded no relief. As soon as it was discovered, that the matter was *res judicata*, he would have been equally bound, as a court of common law. It is better that an individual should suffer, than that the great landmarks of the law should be overturned. No prudent man would, I think, be willing to invest any judicial tribunal with so formidable a power. Thus in *Ex parte Goodwin*, 2 Vern. 696, a bankrupt having his certificate allowed, and having slipped his time of pleading it at law, to a debt precedent to the bankruptcy, is not to be relieved in equity. The chancellor says, a Court of Chancery is not to alter the law. Again, a Court of Equity is not to relieve either mispleading, or where there is neglect, or want of plea, or no proper plea put in in time. It is in vain to talk of fraud. This does not come within that class of cases, but is the discovery of testimony which it was not in the power of the defendant to produce on the first trial.

Taking it then as proved, that a court of competent jurisdiction has adjudicated upon the very point in controversy, it remains next to inquire, whether the record of the former recovery be in this case conclusive evidence. It is admitted to be *prima facie*, but it is strenuously contended, that the jury are not concluded from inquiring into the truth of the fact. In this part of the case, it becomes important to attend to the pleadings. The gravamen of the plaintiff's suit is said to be the continuance, and not the erection of the nuisance, and so far as damages are claimed, the position of the plaintiff's counsel is correct. It is impossible, however, to continue a nuisance unless a nuisance existed; and to maintain the plaintiff's action, the record of the former suit must have been given in evidence, or the plaintiff must here become nonsuit. The defendant's plea of license, I do not understand as extending only to the continuance, but is co-extensive with the allegation in plaintiff's declaration, that there was a nuisance, which had been continued. It is impossible to separate the continuance of a nuisance from the original erection. The whole difficulty arises from our short mode of pleading. Had the defendant been called on to spread his plea on the record, it would, I take it for granted, have contained a statement of facts which were given in evidence to the jury. Had that been done, the plaintiff might demurred, by which the whole matter would have been referred to the court,

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pleaded the former recovery, by way of estoppel, or have taken issue on the fact, license or no license. He has not thought proper to do so; but, as the defendant has pleaded generally, a license, he has replied in the same manner, that there was no license. He has elected to refer the matter to the jury, and the question then is, whether the jury are precluded from inquiring into the truth of the case. If a party will not rely on estoppel when he may, but takes issue on the fact, the jury will not be bound by the estoppel, for they are sworn to find the truth of the fact. They cannot, it is true, find against any thing which the parties themselves have affirmed, or admitted on the record, for that would be going out of the issue, although such admission be contrary to the truth; but in other cases, though the parties be estopped to say the truth, the jury are not. 1 *Salk.* 276. *Bull. N. P.* 298. And of this the defendant cannot complain, as instead of praying judgment of the court, whether the defendant ought to be admitted, or received to his plea of license, &c. contrary to the record, he takes issue on the fact of the existence of the license. The former verdict was powerful evidence to guide the jury, in the second suit, but that they were not absolutely bound by it, is apparent from adjudged cases in *England*, and in our sister states. Slight grounds would not justify the jury in disregarding the first finding, but we are to presume, that circumstances were shown, sufficient to warrant the second verdict, that a license had been given, to authorize the erection of the dam of the defendant.

These principles only apply where special pleading is required, for I grant, that where the parties are not bound to plead or reply, specially, the record of a former recovery is conclusive evidence, binding the plaintiff, the court and the jury, as in actions of *assumpsit* and debt. In such case the party has no choice, and shall not be considered as having elected to have a reinvestigation of the facts. And this is the meaning of Chief Justice DE GREY, when he says, "this is, as a plea in bar, and as evidence conclusive, between the same parties." In order to make the former recovery conclusive, it is necessary, where special pleading is required, that it be pleaded by way of estoppel. By this plea, he prays judgment of the court, whether the defendant ought to be admitted, or received to his plea of license, contrary to the record. Upon the same principle, says *Phillips*, in his *Treatise on Evidence*, page 223, it is presumed, a judgment will be as evidence conclusive between the same parties, in those cases where it can be given in evidence without being specially pleaded. The rule has been expressly declared, with reference to the judgments of courts of concurrent jurisdiction, and it seems to be equally applicable in principle to a former judgment of the same court. Thus, in an action of *assumpsit*, the defendant may either plead a judgment recovered, or give it in evidence, under the general issue; and it is difficult to assign a reason, why the judgment should not have the same conclusive

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operation, if given in evidence without pleading, as it would be admitted to have, if pleaded in bar.

In *Bull. N. P.* 298, it is stated, the jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary; but in other cases, though the *parties* be estopped to say the truth, the jury are not; as in *Goddard's* case, where the bond was dated nine months after the execution, and after the death of the obligor. *2 Co. 4, b.* Thus *Goddard*, as administrator of *James Newton*, brought an action of debt against *John Denton*, upon a bond made to the intestate, bearing date the 4th of *April. 24 Eliz.* The defendant pleaded, that the intestate died before the date of the bond, and so concluded, that the said writing was not his deed, upon which they were at issue; the jury found specially, that the defendant did deliver it as his deed, the 30th of *July, 23 Eliz.*, and that the intestate was living the 30th of *July*, and that he died before the date of the bond; and prayed the advice of the court, whether this was the defendant's deed. And it was adjudged by *ANDERSON*, Chief Justice, *WINDHAM*, *PERIAN* and *WALMESLEY*, that it was his deed; and the reason of the judgment was, that although the obligee, in pleading, cannot allege the delivery before the date, because he is estopped to take an averment against any thing expressed in the deed, yet the jurors, who are sworn to say the truth, shall not be estopped, for an estoppel is to conclude them to say the truth; and, therefore, jurors cannot be estopped, because they are sworn to say the truth. In *Trevivan v. Lawrence*, *1 Salk.*, the court held, that not only the parties, and all claiming under them, but the court, and jury, were bound by an estoppel, and that the jury could not find against the estoppel; but the court took this distinction, which is immediately applicable to the question now under review, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff, that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, (which is this case,) but takes issue on the fact, the jury shall not be bound by the estoppel, for they are to find the truth of the fact. Thus in debt for rent, on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenement; because, if he had pleaded that specially, the plaintiff might have replied, the indenture, and estopped him; but, if the defendant plead *nihil habent*, and the plaintiff will not rely on the estoppel, but reply, *habent*, &c., he waives the estoppel, and leaves it at large, and the jury shall find the truth, notwithstanding his indenture. And here, let it be noticed, that this case not only establishes the general principle, but the distinction taken, that the rule applies only where the defendant is bound to plead specially. When he elects to go before

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the jury, he waives the estoppel, and refers the truth of the fact of the license, to be determined by the jury at large. This doctrine, thus early recognised, has continued, and now is the law of *England*, 1 *Starkie*, 206. The same doctrine has been taken in our sister states, *Kentucky* and *Connecticut*; nor can I perceive that it has ever been infringed in any adjudged case. *Church v. Leavenworth*, 4 *Day*, 274. *Canaan v. Greenwood*, 1 *Con. Rep.* 1. *Turnpike and Edwards v. McConnell*, *Cooke's Rep.* 205. The cases of *Shelton v. Barbour*, 2 *Wash. Rep.* 64, *Preston v. Harvey*, 2 *Hen. & Munf.* 55, turned on the conclusive nature of the judgment, without reference to the pleadings. Their attention does not appear to have been drawn to the point; and, however I may respect the opinion of these courts, I do not consider these cases as affecting this question. It will be seen, that we do not entirely agree with Chief Justice SWIFT, in the case of *Church v. Leavenworth*, where he says, that verdicts are never conclusive, unless they are pleaded specially, by way of estoppel. The rule must be taken with the qualification before stated. The cases on which he relies do not, I conceive, support the position in the broad manner laid down, as I apprehend, could be easily shown, were the cases open to examination. I, however, must cheerfully concur with him in the opinion, that we may as well question any other principle of the common law as this. If the ground is to be taken, that because we doubt the reason, or propriety of an established rule, we are at liberty to reject it, and substitute another for it, then all principles are again thrown afloat on the ocean of uncertainty, without any compass but the discretion of the judge.

The foundation of the law is not laid on such a fluctuating basis. It has been pronounced, by the greatest jurists, to be the perfection of reason, not of every man's natural reason, but an artificial perfection of reason, gathered by long study, observation, and experience. *Co. Lit.* 97, b.

Two other bills of exceptions have been pressed upon the attention of the court. The first is the declaration of *Godfrey Blyth*, which becomes evidence, in consequence of the presence and assent of the plaintiff.

The second, we consider as the ascertainment of a fact, which can be done without the presence of the parties. Although *Kilheffer* may not have been within ear-shot at the time, yet he, with others, had gone there for the purpose of ascertaining the mark, and the admeasurement of the height of the dam, from that mark. His accidental, or intentional absence, is no reason for rejecting the testimony. It is the opinion of the court, that the judgment be affirmed.

HUSTON, J.—The question how far, and in what cases a trial and judgment, in a court of competent jurisdiction, is conclusive of the same matter, coming directly or incidentally before another

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court, and not by appeal or writ of error, is one of general consequence. The law seems not to be disputed, but under what circumstances it will avail a party, has become a question. In *England*, before the year 1776, and long after, in *New York, Massachusetts, Virginia, Pennsylvania*, and in the Supreme Court of the *United States*, it is held to be equally available, whether pleaded in bar, or given in evidence, when the rules of law permit it, under the general issue, as in *assumpsit*, and in ejectment; but, in some late elementary writers, we find it laid down on the authority of a distinguished *English* judge, (who has introduced more changes into *Westminster Hall* than any other ancient or modern judge,) that it is only available when pleaded as an estoppel. On full consideration, I incline to the opinion, that this latter change is not an improvement, but an error. It seems to be supported first, by the cases which say, that a jury is not bound by an estoppel; and, secondly, which say, that a Court of Equity is not.

An estoppel is always something personal—the party is estopped from recovering his claim, or proving his defence, by some act in law, or in deed, or in *pais*, which precludes him from going beyond it, and proving all the case. It always arises from the act of the party estopped by it; but if the opponent, instead of relying on this act, will go beyond it, and put the cause at issue on other, and especially anterior facts, the estoppel being waived by him who had a right to avail himself of it, ceases to operate. For example, a man sues in debt for rent on an indenture, the defendant pleads, that the plaintiff had no title to, nor possession of, the premises demised; if the plaintiff, instead of relying on the indenture, which in law estops the defendant, will reply, and go to issue and trial on the facts pleaded by the defendant, the jury, who are always to try the facts in issue, are not estopped by an indenture, not relied on by the plaintiff, from finding the truth.

So, in equity—a suit is brought at law on a bond executed by three, and judgment obtained; on application to chancery, stating, that at the execution of the bond, it was expressly agreed, that each obligor should only be liable for one-third, and that the defendants being estopped by their deed from availing themselves of this agreement at law, the plaintiffs had issued execution, and levied the whole on the goods of one,—equity will grant an injunction and stay of execution against any one on his paying in one-third of the debt, interest, and costs; because the plaintiff is using, against justice and conscience, a judgment fairly obtained, and equity is not bound by the estoppel, arising from the act of the obligors, in sealing the deed.

But a former trial, verdict and judgment is not the act of the party, but of the tribunal which decided it, and to call it an estoppel, is a misapplication of terms; it has not the distinguishing mark of an estoppel; it is not the consequence of some act of the party bound by it; it is a bar to a future recovery in any court, on the

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same point, between the same parties, or privies, until reversed on appeal, or writ of error; and it is as much a bar in chancery, where an attempt is made to re-examine a matter once decided at law, as it is in a court of law; it is as much a bar in actions where we cannot plead specially, as ejectment, as in any other action, and as much a bar in an inferior tribunal, where there are no pleadings, as in one where the pleadings are, or may be drawn out at length. Such are my impressions on this point, believing that the courts in this, and the other states, and the Supreme Court of the *United States*, have put the matter on its true ground, viz. that the order and peace of society, the structure of our judiciary system, and the principles of our government, are the true grounds why such a judgment is conclusive. I am not willing to leave this ground and rest it on the narrow and inapplicable one of estoppel. I also incline to the opinion, that even on a plea of a former trial, on the same point, &c., the issue is always to the country; for although it is pleaded with a *profert prout patet per recordum*, yet the plea must go on, and put in issue, whether the parties are the same, the point the same, &c., and if plea does not do so, the replication may put these matters in issue, and thus there will be no bar arising from a former decision.

There are, however, cases in which it may not be possible that this, whether pleaded or given in evidence, will apply, as in a suit for continuing a nuisance of the kind now considered. The former verdict and judgment may have proceeded on the ground, that the license was void, but we can hardly suppose this, and in fact, this was not the issue, which if license had been set out, and plea found, would have been, that the dam was not raised more than six feet seven inches. The former verdict and judgment will be conclusive that it then was; but in this suit for a continuance, perhaps instead of relying on vague testimony, that the dam was continued from 1815 to 1820, at nuisance height, the true cause would be for the jury to ascertain that it, in 1820, was or was not higher than six feet seven inches clear of the rock; and if it was, find for the plaintiff, if not, for the defendant. I say, this was perhaps the true course, for as the issue was not made up at length, we cannot tell whether that verdict was given on the ground, that there was no license, or on the ground, that the defendant had exceeded the height allowed by his deed. Whatever may be made certain by the record, ought to appear by the record, but where that cannot be, as in ejectment, it may, nay must be made out by parol: as the plaintiff in this case might have had on the record the very point on which the former trial turned, and did not. I think the judge was not wrong in permitting the evidence to go to the jury.

The other points I am not disposed to reverse for. In such a case, the previous testimony must have so much effect in determining, whether a particular act or declaration of a party, is to be admitted or rejected, that without it we cannot form a correct opinion. Gene-

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rally when men claim together by some contract, and are together discussing it with an opponent, the declarations of one, in presence of the other, is evidence against that other; but, where a trespass against one, is also, in some respects, alleged to be a trespass against another, it would not be universally true, that the declarations of one trespassed on, would be evidence to affect the other, though he was present and heard the expressions and did not dissent: nor would it be universally true in all cases, that expressions in such circumstances, must be rejected by the court: something arises in almost every trial, some expressions are used by many witnesses not legal evidence; and it often happens, that in the course of a trial, evidence comes out, which, if known before, would have induced the judge to reject part of what had been previously received. The court will and do explain this to the jury, and it seldom does any harm. I would not agree to reverse for any such hairbreadth mistakes.

I agree the judgment be affirmed, but have thought the first point of sufficient importance to express my opinion on it.

Judgment affirmed.

[LANCASTER, JUNE 3, 1828.]

BAILEY *against* WAGONER.

IN ERROR.

Where the defendant complains of irregularity in the issuing of a *fieri facias* after a year and a day without a *scire facias*, on which his lands were sold, he should complain at the earliest opportunity: if he lies by, he is considered as waiving the objection by his laches.

The complaint should, in the first instance, be made to the Court of Common Pleas, if the process issued there.

THE opinion of the court was delivered by

ROGERS, J.—A *fieri facias*, *post annum et diem*, is not void, but voidable. The plaintiff is put to a *scire facias*, that the defendant may have an opportunity of showing that the debt is paid, and, as it is intended for his benefit, he may dispense with the writ, either by express agreement, or by conduct, which amounts to a waiver; and this, in fact, is frequently done when the defendant is aware that the debt is not paid or otherwise satisfied. When an irregularity has occurred, it is the duty of the opposite party to take advantage of the defect at the earliest opportunity; otherwise, in consequence of his own laches, he will be decreed to have waived every advantage arising from it. It would be unjust that the defendant should lie by with a knowledge of an error, and by this means delay his adversary, and expose him to unnecessary

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trouble and expense. Courts are desirous, or should be, of enforcing fair dealing, and preventing trick and chicanery, which are the disgrace of the law. Hence, the rule is, that the party must seize the earliest opportunity of suggesting the error, otherwise it is considered as waived. The judgment was entered on the 25th of *December*, 1822, on which a *fieri facias* was issued to the *August* term, 1824, which was returned, "Lands levied on and condemned." A *venditioni exponas* was sued out to the *November* term, 1824, and money made. The plaintiff in error, who was defendant below, now seeks to reverse the execution, and obtain restitution of the costs. These proceedings could not have taken place without notice to the defendant, and being aware of them, he should have applied to the Court of Common Pleas to set them aside. He cannot, with justice, complain of the costs, as it is not alleged that he paid the money, or otherwise satisfied the debt except on the execution, nor has he taken any steps whatever to arrest the proceedings. If application had been made to the Court of Common Pleas *non constat* that the defendant might not have proved the express assent of the defendant, that court would have full power to inquire into the facts, which the Supreme Court are precluded from doing, and this with me, is a strong argument to show, that application for relief should have been first made to them. Permitting the defendant to pass by the Court of Common Pleas, and to allow him to come, *per saltum*, into this court, puts the plaintiff, in case of an agreement, entirely in the power of the defendant; for unless the agreement appears on the record, we cannot inquire into its existence. This consequence will be avoided by saying, that the application should have been made in the Court of Common Pleas, who have full power to administer justice to the parties according to the truth of the matter, and the law of the land.

Execution affirmed.

 [LANCASTER, JUNE 1, 1829.]
ROUSE *against* MORRIS, Administrator of KOONS.

IN ERROR.

A physician is entitled to be paid out of the assets of a deceased insolvent, his claims for physic and attendance previous to the last illness of the deceased.

WRIT of error to the District Court of *York* county.

This, in the court below, was a case stated, in nature of a special verdict, on which judgment was to be rendered for the plaintiff or defendant according to the opinion of the court.

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The intestate, *John Koons*, at the time of his decease, was indebted to the plaintiff in thirty dollars, for physic furnished and attendance rendered him by the plaintiff as a physician, previously to his last illness. The personal estate of the deceased in the hands of his administrators, (defendants,) was sufficient to pay funeral charges, physician's bills, and servants' wages, but not sufficient to pay the judgments and specialties owing by the deceased at the time of his death.

The District Court rendered judgment for the defendant at *March* term, 1828, on this special verdict.

The opinion of the court was delivered by

ROGERS, J.—In the fourteenth section of the act of 1794, it is enacted, that *all debts* owing by any person within this state, at the time of his or her decease, shall be paid by the executors or administrators, so far *as they have assets*, in the manner following:—"First, Physic, funeral expenses, and servants' wages; second, rents, not exceeding one year," &c. It is conceded, that the term *physic*, as used in this section, is not confined to the drug administered, but includes every service or medical aid rendered by a physician to his patient: but, a difficulty has arisen, as respects the period for which he has a right to charge, and whether the bills be not confined to services and attendance during the last illness. This is an interesting question to the medical faculty, but more particularly so to the poor and indigent; and it is a matter of some surprise, which can only be accounted for by the trifling nature of the respective demands, that being supposed to admit of doubt, the question has not yet received a final adjudication in the court of the last resort. Contrary opinions seem to have been entertained in different judicial districts, which it is desirable to remove by a uniform construction of an act which affects so large a class of the citizens of this state. We feel ourselves called upon to decide this question for the first time, unshackled by uniformity of practice; but, at the same time, without the light of judicial precedent.

The act of 1794, speaks of *all debts* owing by the intestate, and prescribes the order of their distribution. The legislature must have been aware, that then as well as now, physicians had long outstanding and unsettled accounts, against their poor patients, and I think it unlikely that they should, in the fourteenth section, intend to discriminate between debts contracted between the same parties at different times. The whole account constitutes but one debt, and the legislature and courts of justice have never favoured the splitting up of debts, because it creates costs and increases expense and trouble in the multiplication of law-suits. If the legislature intended to confine the priority to services rendered during the last illness, it is inconceivable that it was not so expressed in terms, as has been done in some of our sister states; and

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this argument derives additional strength from the fact, that in the very next class of preferred debts, they have expressly restricted rents not exceeding one year. So, also, in other sections of the act of 1794, when the legislature intend to restrain the obvious import of terms, they have taken great care to do so, as will be seen by reference to the act itself. Had the restriction not been introduced, it would not have been doubted, that landlords would have been entitled to all arrearages of rent, for even more than one year. Has it ever been disputed under the same section of the act, that the owners of more than one judgment, recognisance, bond, &c., are entitled to have all preferred, however numerous they may be? And this construction arises from the generality of the expressions, which it is not competent to this court to restrain, unless it should appear to be contrary to the general intent and spirit of the act. It will, I suppose, be hardly questioned, that services rendered to the wife or child, as they would be the proper debt of the husband, or father, would come within the purview of the act: and what would be the measure of compensation in such a case? Would you confine it to the last illness of the patient; and, if so, by what authority and under what section would the construction be adopted? Unless medical attendance upon the wife and children of the deceased insolvent be preferred in payment, more than half of the objects of the clause will be defeated. It is not less important or interesting to the poor man, to have an assurance of medical attendance upon his wife and children, than upon himself. Yet, if the law be so construed as to confine the preference to *his last illness*, then, of course, all attendance on his family is excluded. As the legislature have not discriminated between the services rendered, it would appear to me to be a usurpation of legislative powers, for this court to draw the line of distinction. The act of 1794 was intended, not so much for the advantage of the physician, as for the relief and comfort of the poor, that class which most requires the benevolent protection of the laws. The object would seem to be, to secure them prompt medical aid, in all cases, so far as the prospect of some reward, which operates on physicians as on others, will produce this effect. The commonwealth has a deep interest in the life and health of all her citizens, and no sacrifice of property is too great to secure these inestimable blessings. It was thought, with what truth was for them to decide, that medical aid would be more certainly and more promptly afforded, by giving physicians a preference in the distribution of intestate's estates. That it would secure the indigent poor early and prompt assistance, and, moreover, might be a means in aid of the humanity of preventing a demand of payment before and immediately after the services were performed, which the pressure of misfortune and sickness would prevent them from paying.

It is said that compensation is confined to the last illness, and it would be well to inquire what is a man's last illness; for the ad-

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vocates of this doctrine seem to consider it something definite and well understood. In many diseases, such as consumption, diseases of the liver, ruptures, cancer, jaundice, some fevers and other disorders, the constitution of the patient is gradually undermined; and, although he may have intervals of comparative health, enabling him to attend to his ordinary business occasionally, or even for weeks or months at a time, still the disorder progresses and never wholly leaves him, and after the lapse of a few years it conducts him to the grave. I would ask the advocates of this doctrine from what period is the *commencement* of such a man's last illness to be dated? A man is sometimes reduced very low by the ordinary fevers of the country, and after some months of confinement he becomes convalescent, and recovers so far as to attend to his ordinary occupation for several months; but his body not being yet hardened, by reason of an accidental exposure or undue exertion, a relapse takes place, and after another confinement of some weeks, he dies. What, in this case, was the duration of his last illness? Is it probable that in an act of assembly manifesting in every section an extraordinary degree of precision in language, and particularity of enactment, the legislature should, in the clause in question, mean a thing so vague, uncertain, and indeterminate, as the *last sickness* of a man; and still further, that the legislature should express that vague meaning, by the yet more vague and general expression of *physic* for the deceased?

Ought the court, even in a doubtful case, to adopt a construction that must equally embarrass the representatives and the creditors of the deceased in its application, and fill the country with litigation?

The clause in question, so far from confining the preference of the physician's bill to attendance upon the deceased in *his last illness*, does not confine it to *his sickness*. The expression is most general, "*physic*," evidently meaning a debt to the physician, for which the deceased, in the ordinary course of things, became liable, whether for attendance upon himself or his family. If the legislature had intended to limit the preference to *his last illness*, or even to *his sickness*, nothing was more easy than to have framed the clause accordingly. The act of the 19th of *April*, 1794, contains many formal provisions, and one in the fourteenth section itself, and in every section it abounds in qualifying and restricting phrases, provisions, and enactments. How then, with due respect to the legislature, can it be supposed, that in the very material and highly useful clause under consideration, important limitations and restrictions which almost make the clause a dead letter, were intended that are not expressed, and that the framers of the laws did not mean half of what the words used by them plainly import?

If the physician be restrained to services rendered during the last sickness, the same rule must be applied to servants, who are embraced by the same clause. This would, in most cases, prove

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a most advantageous protection to them. If their employer were to die suddenly, they would be entitled to nothing.

The result of the doctrine, that he should be paid only for services rendered during the last illness would be, that the physician who attended him at the time of *his death*, would be paid, whereas, he under whose care he recovered his health, would be entitled to nothing. It is unnecessary to follow this argument.

It is argued, that to extend the performance beyond the attendance on the deceased in his last illness, will introduce physicians' bills of unlimited or long standing, for medicine to the deceased insolvent and his family. This consequence will not follow. The bill will be confined to accounts of six years' standing at most, and the act of limitations will cut off all items beyond that period.

The claim in question, operates only where persons *die insolvent*, and therefore will most frequently be confined to persons, who, while living, were classed among the *poor*. It is seldom that *poor persons* give much employment to physicians, or that they receive such attendance from them as to occasion large bills in each case. Generally, therefore, (even adopting our construction,) the preferred debts under this head, will not be large, nor form any lien, secret or otherwise, to an amount calculated materially to affect the other creditors of the deceased.

It is objected, that it is as important for a poor man to obtain credit with the farmer for bread, or the mechanic for tools, &c., as that he should have credit with the physician for attendance on himself or his family in sickness. This argument will not bear the test of experience. When do we hear in this country of a man or his family ever suffering from actual want of the necessities of life, or reduced to distress for want of credit with the mechanic? But who has not known of many perishing by diseases, and that from the want of prompt and efficient aid of the physician, from delay in calling in a physician in time, on account of inability to pay his demand for services, with convenience.

The attention of the legislature seems first to have been diverted to the health of the citizens, next to their decent burial; and, thirdly, to the payment of servants, who, from their subordinate station in life, were supposed to require legislative protection. This meritorious class of cases must be first paid *out of the assets*, in the hands of the executors or administrators. To this there can be no reasonable objection, as it interferes with no *vested right*, and is a question of policy, of which the legislature are the exclusive judges. The act of 1794, is general in its terms, comprehends all debts, nor is there any thing in any other part of the act which restrains the obvious import of the term used. This construction, in my judgment, best comports with the intention of the legislature. To confine the preference secured by the act, to debts contracted during the last illness, would be to circumscribe the usefulness of the act, and to indulge in a latitude of construction not warranted

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either by its words or spirit. If any inconvenience shall arise from this opinion, (and I do not anticipate any,) the remedy is in the hands of the legislature, to whom the constitution has wisely intrusted it. I believe evils have arisen from courts attempting to be wiser than is written. It is sufficient for me, that this is the plain and obvious construction of the act, nor indeed am I desirous of any change. Laws, which administer to the comforts of the poor, are founded in wisdom, and particularly the act of 1794, which is intended to afford them prompt and efficient medical aid on a bed of sickness.

TOD, J.—The question which has been argued is, whether, out of the effects of a person deceased insolvent, all physicians who may have been at any time employed, are entitled to a priority of payment of all their charges for previous fits of sickness and ailments of every description. It seems to me they are not so entitled, but that their right to be first paid, is confined to services rendered during the last illness, and that for old bills uncollected, they must come in for their just proportion with other creditors. I do not know that a preference such as is here claimed, is given by any code of laws in any country. By the common law, all the fees of a physician, so far from any preference, are honorary merely, and not to be recovered by any mode of compulsion. There is an uncommon brevity in the act of assembly. *First, Physic, funeral expenses, and servants' wages.* Stick to the letter, and pay for *physic* only, without allowing for advice and attendance, and the preference will be next to nothing. On the other hand, it will not be contended, that drugs bought upon credit to set up an apothecary shop, or a special promise to pay for physic administered to another, or a like promise to pay funeral charges, would, on the death of the party contracting, give any right of preference, though coming under the very words of the law. Much, therefore, is left to reasonable construction. The legislature must have supposed their meaning to be plain, knowing that the equality of legal rights is to be intended, except so far as the contrary is directly expressed. The act is speaking of persons recently deceased. Immediately after mentioning the death, it connects a provision for the payment of funeral charges with a provision for the payment of physicians' charges. What doctors' charges, and what funeral charges could have been meant, except those connected with the death just mentioned, and for the event of which the whole law was intended? It strikes me, that had the same words occurred in familiar discourse, there could have been no doubt of their meaning, and that old charges of the doctor, so far from being specially provided for in this act as a debt of the first grade, were not even thought of by the law makers. A person in embarrassed circumstances being taken sick, his ability to pay the doctor will usually depend upon the recovery of his health. On this account mainly, as I take

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it, is the preference given to the physician attending on the last illness. The last bill must remain unpaid. Old charges might have been collected during the life and health of the man. If not, if the doctor thinks fit to give the same indulgence that others give, then I take the law to mean that he must do so at equal risk, and not find it his interest to wait for a preference at the death of the patient, which, during his life, is never given, with a certainty of receiving at some day, his accumulated arrears, perhaps at the sole expense of other creditors. Nor does the argument at the bar, drawn from the preference given to servants' wages, aid this case in my opinion. Servants' wages were preferred by the old common law, according to *Blackstone*, (2 *Comm.* 511.) They were also preferred by our act of assembly of 1693, long before any preference at all was given to the physician. If, instead of the first grade, they had been placed by the existing law in a lower rank of preference, as they were by the old act, it is not easy to see how that could hurt the preference given to medical services, or how the placing of servants in the first grade can be made to help the doctor's claim. It has never yet been decided, that even arrears of servants' wages are to be preferred without limitation of time. But, however that may be, there appears no connexion between their services and the state of health or sickness of their employer: nor any just reason for preferring the old bills of the doctor, because the preference of servants' wages is not made to depend upon the lingering death of their master. The counsel have also founded an argument on the limitation in the law as to *rents not exceeding one year*. That argument does not appear conclusive. The preference allowed to rents began almost with the first settlement of the country. It is given in the act of 1693. Arrears of rents were of old, common and notorious. Hence, the reason of the limitation to prevent the flagrant injustice of a man suffering to go on and accumulate for years, a mass of unsettled debt, to be paid afterwards by the mere operations of law, without any exertion of the creditor at the expense of others. But physicians, I take it, in former times were very rare, and their unpaid bills still more rare. It would seem too much to expect a positive and formal limitation to arrears for medicine from law makers in 1794; particularly, when from the very subject itself, providing for the case of a recent death, and distributing the wreck of an estate among creditors, they might have thought their intent impossible to be misunderstood; and that without any explanation, the bare word *physic*, immediately preceding *funeral expenses*, could never be held to include a book debt for a whole lifetime. We know what favourites landlords have always been with the statute law of *Pennsylvania*. In every case of execution against their tenants, they have the right to be first paid by the sheriff or constable, their arrears of rent not exceeding one year. Every general law for the relief of insolvent debtors from the year 1729 to this day, I believe without

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exception, has given the same priority to the landlord with the same limitation of one year; while no insolvent law has been made giving or mentioning any priority to the physician. Therefore the limitation as to rents, if it is to have any effect upon this question, does seem to me to support my construction of the act. It seems to show a clear intent, thus far, to render the distribution of the effects in cases of insolvency, whether during the life of the debtor or at his death, as nearly alike as is practicable and consistent with some few other reasonable claims of no great importance, and particularly to prohibit any long gathering mass of preferred debt and enormous advantage of one creditor over all the rest. It is hard to believe that the legislature intended, in this single case, to place old arrears of physicians' bills above old arrears of rent. To me it seems not only hard, but impossible, to believe any legislative intent so unreasonable as that when a physician, with the blessing of God and by his own art, can keep alive and restore to health an insolvent patient, his only encouragement in the way of pay, must be a small dividend with other creditors; while, in a contrary event, by one and the same stroke of fate, the poor man loses his life, and the doctor gains a security equal to a mortgage not only for pay for the last services, but for his whole book from the beginning. I dislike a construction by which, against all the analogies of the law, liens without number may be suddenly thrown upon all property real and personal. A mortgage unrecorded, is good for nothing against others. A judgment cannot exist except upon public records. Even a secret ownership by assignment of personal goods is of no avail against creditors while the debtor continues in possession. All these guards against mistake and deception, are nearly useless, if, upon the death of a man in debt, unlimited prior incumbrances can be brought from private books to cover the effects, the possession of which was probably the inducement with others to trust the deceased. If the law had meant that old claims by book debt and bills, should, upon the death of the person charged, be thus transformed into a mortgage payable before any thing else, it would, I think, have put others on their guard by some mode of giving previous notice of the blow. The priority of servants' wages can produce no unexpected effect. Even suppose no limitation as to time, it must be a rare thing for their wages to be long in arrears. They are persons who cannot well afford a long credit. The funeral expenses may be estimated: so may the physicians' charges for the last illness, near enough for any purpose of reasonable caution. But, the existence of previous bills of all the physicians that ever were employed, cannot be known, nor the amount of them conjectured. Admitting the policy of the law to be, that a poor man shall not, for the benefit of his creditors, be deprived in his hour of necessity, of any personal aid or comfort: admitting also the priority to have been given for the sake of the patient and not for the sake of the physician, yet still it appears to

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me that the policy of the law will not, any more than the words of it, carry the preference any further back than the last illness. It will hardly be said, that physic is the only necessary of life in a poor family. If credit with the doctor may be sometimes useful, credit with others must often be indispensable in a house assailed by those misfortunes which often come together, of debt and sickness. Among physicians, I mean those of them whose aid is worth having, a refusal to attend the sick from fear of losing their fee, was, I believe, never heard of. This generosity cannot often be expected from those creditors who furnish provisions, clothing, and fuel. They are poor men themselves, or generally very reluctant to lose what they work hard for. And if they do trust, what will be the consequence? Sickness to a man harassed in his affairs, may be ruin. I should apprehend, that at the third fit, if not before, the constable will be sure to come in, *pari passu*, with the doctor, with a bundle of executions sent from no other motive but to be beforehand with that day, which, after the funeral is paid for, gives all to the physicians. Practice and popular construction ought to have weight in every day cases of this kind. From inquiries made on former occasions and on this, I am persuaded that generally, in the distribution of assets of a person deceased insolvent, with some exceptions, respectable indeed but few, the right of the physician to be first paid has been confined, in courts of justice and out of them, to his charges for the last illness. The judgment of the court below ought, in my opinion, to be affirmed.

Judgment reversed, and judgment entered for the plaintiff.

[LANCASTER, JUNE 4, 1828.]

M'FADDEN against GEDDIS, late Executor of an instrument purporting to be the Will of SAWYER.

A decree of the Orphans' Court settling the account of an executor, is conclusive as to all matters contained in it in an action for a distributive share, or any collateral suit.

It seems that if a parent has given a child more than would be its share, and dies intestate such child cannot be compelled to refund.

Where heirs make an arrangement among themselves, whereby a large part of the fund coming from the intestate is withdrawn from regular distribution, and release this part to a single heir, query, if the administrator can be made answerable for not distributing according to law, by compelling those advanced to bring their shares into *hotch pot*.

APPEAL from the Circuit Court of *Lebanon* county, held before the Chief Justice. The suit was brought by *Sawyer M'Fadden* against *Robert Geddis*, late executor of an instrument purporting to be the last will and testament of *John Sawyer*, deceased, and a verdict was rendered for the plaintiff.

(*M'Fadden v. Geddis*, late Executor of an instrument purporting to be the Will of *Sawyer*.)

The case was argued by *J. A. Fisher* for the defendant, and *Elder* for the plaintiff.

The opinion of the court was delivered by

HUSTON, J.—The plaintiff's statement set out, that *Sawyer M'Fadden* sues to recover a debt in the following manner:—That *John Sawyer*, on the 22d of *August*, 1813, died intestate, leaving a widow and seven children, (naming them,) and the plaintiff, the only child of a deceased daughter, whereby he became entitled to one-eighth of two-thirds of personal estate: That a paper writing, dated the 3d of *July*, 1804, purporting to be the last will of *John Sawyer*, received probate on the 16th of *September*, 1813, and letters testamentary issued to *Robert Geddis*, who took on himself the office of executor, and the personal estate of *John Sawyer* was by him received, amounting to twelve thousand dollars. That some time after it was in due form of law decided, that the said paper was not the will of *John Sawyer*, deceased. The plaintiff, therefore, says he is entitled to a large sum, viz. one thousand dollars, being one-eighth of two-thirds of said estate, together with interest from the 22d of *August*, 1813. Pleas, *non assumpsit*, and payment with leave, &c. The plaintiff gave in evidence an inventory, filed in the register's office by *Robert Geddis*, as executor, amounting to nine thousand five hundred and forty-six dollars and eighty-eight cents. The defendant then gave in evidence an account of the administrator of the said estate, filed by *Robert Geddis* in the register's office, the 2d of *July*, 1819, showing a balance in his hands of five hundred and thirty-one dollars and sixty-eight cents, to which exceptions were filed by *Sawyer M'Fadden*, the present plaintiff. A decree of the Orphans' Court was made, sustaining the exceptions, and deciding the real balance to be one thousand three hundred and eleven dollars, and eleven cents: this was on the 4th of *September*, 1823. *Robert Geddis* appealed to the Supreme Court, and on the 21st of *May*, 1825, the decree of the Orphans' Court was affirmed. The defendant also read the paper, called the will of *John Sawyer*, and letters testamentary to *Robert Geddis*, and rested, offering to the plaintiff a judgment for one-eighth of the whole sum of one thousand three hundred and eleven dollars and eleven cents, (the widow being now dead,) and interest from the decree of the Orphans' Court, 4th of *September* 1823.

I understood the defendant's counsel as agreeing to abide by this offer in this court, and the plaintiff's counsel as distinctly admitting, that if this account was final, he could not get interest farther back. Possibly on another trial the cause may stop at this point. At the trial, however, the plaintiff then read the record of proceedings to vacate the will and letters testamentary, and the judgment of the 12th of *March*, 1818, and offered an inventory, exhibited by *Robert Geddis*, as administrator, (for he had taken

(M'Fadden v. Geddis, late Executor of an instrument purporting to be the Will of Sawyer.

letters of administration,) of *John Sawyer*, on the 8th of *January*, 1821, amounting to eight thousand two hundred and eighty dollars and fifteen cents.

The alleged will directed expressly, that all monies on bonds, notes, or book accounts, which have been, or shall be got from any of his children, shall be considered as part of such child's share of his real and personal estate; his real and personal estate to be turned into money, and it and the personal to form a fund, to be equally distributed among his children. The inventory filed by *Geddis*, as executor, consisted almost entirely of bonds, notes, and book accounts, and receipts of money by the several children to *John Sawyer*, in his life time, and his credits were for these as uncollected, and for some debts paid. The second inventory, filed by him as administrator, contained, I believe, nothing which had not been in the first, though not all that was in it, and consisted almost exclusively of these bonds, notes, and receipts of the several children, and accounts of *John Sawyer* against them. Some of the children, had I think, received from *John Sawyer*, in his life time, more, much more than what would be an equal share of his real and personal estate. This second inventory was objected to by the defendant, but received, and the point noted. I should suppose it more material to the defendant than the plaintiff; for on comparing the two inventories, it showed that the executor had delivered over to the administrator every thing except the one thousand three hundred and eleven dollars and eleven cents.

From the manner in which the cause appeared in this court, it is not in my power to exhibit all that occurred, in a manner which I am certain would be correct.

It seems to have been contended by the plaintiff, that such of the children as had received more in the testator's life time than their share of the whole estate, must refund. The law seems to be settled, that if a child claims any thing from the estate, what that child has received must be taken into the account, and only a sum which will make that child equal with the others, can be claimed as a distributive share.

If a parent has given to one child more than would be its share, and dies intestate, generally, such child will not be compelled to refund, though it in such case will not get any portion of what is to be distributed, and such would seem to be our law. See act of the 4th of *April*, 1794, *Section 9th*. In case of partial advancement, it would seem by our act, land and personal estate descending, and advancement in lands or money, are put on the same footing. In this case one of the children had purchased the plantation, and had the releases of all the others, and of *Sawyer M'Fadden*, the plaintiff, among the rest. The defendant offered these releases in evidence and they were rejected. They were offered for two purposes: it was contended, that if the advancements were to

(*McFadden v. Geddis*, late Executor of an instrument purporting to be the Will of Sawyer.)

be considered, it would only be on taking the land and personal estate both into view, and that by releasing the land, the several heirs, and the plaintiff among the rest, had rendered this impossible. It would seem, from the *Precedents in Chancery*, 170, and 3 *Bac.* 77, that *hotchpot* only exists in case of total intestacy, not in cases where part of personal estate is devised away, and intestacy only as to part. Perhaps then, where all the heirs make an arrangement among themselves, which withdraws from distribution a large part of the fund, and release this part to a single heir for a valuable consideration, they put it out of their own power to call on the administrator to settle in the same manner and on the same principles throughout, as if the whole fund had been left for division. There is not, however, enough before this court to decide this fully in this case. Another point was discussed—whether, as the heir who bought paid very different prices to the others, this was not done with reference to the advancements of each. Perhaps a point decided by this court may render it unnecessary to discuss these matters further—in 1826 this court decided in the case of *Robert Peebles's* appeal, (now reported, 15 *Serg. & Rawle*, 39,) that an executor who proves a will, which is afterwards vacated, may settle an account in the Register's Court of his administration up to the time the will is declared void, and that the Orphans' Court are bound to pass on such an account. To that case I refer for what may be lawfully done by an executor so situated. It was decided without referring to an act of assembly which would seem to end all cavil. By the act of the 13th of April, 1791, Section 18th, 3 *Smith's Acts*, 30, *Purd. Dig.* 704, it is provided, that no appeal from the decree of the Register's Court concerning the validity of a will, or the right to administer, shall stay the proceedings, or prejudice the acts of any executor or administrator pending the same, &c. &c. When the will was declared void, and letters testamentary revoked, the executor's power to act ceased; it was then his duty to settle his account and deliver over the effects, &c. unadministered to the administrator.

Here such an account was settled, contested by the plaintiff in this cause, and appeal after appeal, until a decision by the highest tribunal. Was this conclusive? The Chief Justice before whom the cause was tried thought not. The general doctrine, that a judgment of a court of competent jurisdiction, cannot be questioned or impeached collaterally in another court in an action between the same parties, on any point once directly in issue and decided; and, that neither a Court of Chancery nor a court of law, can examine into the merits of any judgment of any court having authority to decide it; (except on appeal or writ of error,) would seem to be as well settled as any thing can be, and is so necessary to the peace and order of society, as well as consonant to reason, that it seems strange it was ever contested. 2 *Bac. Ab.* 309, 6 *Wheat.* 109, 1

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Johns. Ch. 91, and many cases in our own reports. The decrees of our Orphans' Court, and of the Supreme Court, confining them, or modifying them, have sometimes been considered exceptions to this rule, and we have inconsistent decisions. In 3 *Serg. & Rawle*, we find a judgment reversed because the Common Pleas rejected an administrator's account, settled and confirmed, and in *Korr v. Fellerhoff*, 4 *Serg. & Rawle*, a directly contrary decision. This was in 1818, and led to an act of assembly in 1819, often cited. The principal legislative provisions on this subject are the following: The act of the 27th of *March*, 1713, 1 *Smith. S1, Purd. Dig.* 610, *Section 1st.*, gives power to settle the accounts of all persons having estates, &c. of minors; and if upon examination, it shall appear such persons have misbehaved to the prejudice of said minors, to certify the same, which shall be *good evidence* for the party grieved to receive his damages at law. *Section 8th*, empowers the Orphans' Court to enforce its sentences and decrees by imprisonment of the body, or sequestration of lands or goods, as fully as a court of equity could do. *Section 9th*, gives an appeal to the Supreme Court. *Section 11th*, directs minors, on settlement of accounts and payment, to enter satisfaction; and if they do not, empowers the court to certify, that such persons have accounted and paid, which shall be a sufficient discharge to guardians, tutors, executors, or administrators, who have so accounted and paid, and, thereupon, their bonds shall be delivered up and cancelled.

By the act of the 4th of *April*, 1797, *Section 3d*, any executor or administrator, on settling his account and paying the balance, and delivering goods unadministered, may be discharged. These acts not being found sufficient, on the 8th of *February* 1819, *Section 11th*, it is enacted, that when the accounts of guardians, executors, or administrators, shall be finally settled, and the same confirmed by the Orphans' Court, no appeal shall lie therefrom, unless the same be entered within one year after the said confirmation; and, by the act of the 1st of *April*, 1823, *Section 11th*, unfiled transcripts of sums appearing to be due by guardians, executors, or administrators, on settlement of their accounts in the Orphans' Court, may be filed in the office of the prothonotary of the Common Pleas, and shall be a lien on the estate of such guardian, executor, or administrator, until paid, with provision to sue by debt or *scire facias*; and, with provision, that in case of appeal the lien shall be for no more than finally found due.

It was said, this was not a final account; but it was, and until the will avoided, the executor could not sue the several heirs. When avoided, his power ceased, and he had nothing further to do than deliver all over to the administrator. He is sued as late executor, and it is a final account of him as executor, though, perhaps, not final of the estate. Since this act, in *M'Pherson v. Cuntiffe*, 10 *Serg. & Rawle*, and in 14 *Serg. & Rawle*, 184, it was decided in

(*M'Fadden v. Geddis*, late Executor of an instrument purporting to be the Will of Sawyer.)

this court, that a decree of the Orphans' Court, unreversed and not appealed from, was not to be questioned in a collateral suit, unless fraud or defect appears on the face of the proceedings. When fraud is alleged, it ought to be distinctly asserted.

In *M'Gaw's* appeal also, in 14 *Serg. & Rawle*, this court decided, that an account, on the face of it not final, was not within the act. I was directed to draw the opinion of the court in that case, and I still agree to the decision; but some of the expressions used require limitation, perhaps correction.

On the whole, in this case the opinion of the court is, that this decree of the Orphans' Court is conclusive as to all the matters in it; and not open to revision in this or any collateral suit. Limitation of appeal and direct revision, would be worse than useless, if all matters settled in a decision of the Orphans' Court could be revised in any other court, on any collateral matter occurring there.

GIBSON, C. J.—Although it be a general rule, that the decrees of the Orphans' Court are conclusive, yet if any point has been settled by this court, it is, that the confirmation of an administration account is an exception. It was so held in *Marrot v. Davy*, (1 *Dall.* 164,) so early as 1786. The register was not, as has been asserted of that case, a mere ministerial officer. He passed upon the account in the first instance, precisely as afterwards did the judges of the Orphans' Court, to whose revision his proceedings were subject. In *Miller's Executors v. Miller's Administrators*, (2 *Serg. & Rawle*, 518,) it was held, in an action for a legacy, that a second account, settled after the commencement of the action, is not conclusive; and, it was doubted, whether it would have been otherwise, had it been settled before. It is impossible to assign a particular importance to the date of the settlement. The action was not founded on the decree of a balance in the hands of the accountant, but on the bequest in the will, the decree being but evidence of the amount; and, it is of daily occurrence, to admit evidence as equally competent and equally operative, whether it existed at the inception of the suit, or originated afterwards. But the first account, which was settled before suit brought, was held not to be conclusive. The plaintiff had shown a final account, by which a balance was found in the hands of the executor; to rebut which, the executor was permitted to give in evidence a second, and an entirely distinct account, (not the same opened and altered, as erroneously stated by the reporter,) showing an entirely different balance; and, this second account was held to be competent, though not conclusive proof of mistake in the first; which it would not have been if the first were itself conclusive. But in *Dasher v. Lineweaver*, (3 *Serg. & Rawle*, 200,) it was directly asserted, that such an account is not conclusive between the administrator and claimants under the statute of distribution; and in *Kohr v. Fedder-*

(*McFadden v. Geddis*, late Executor of an instrument purporting to be the Will of Sawyer.)

hoff, (4 *Serg. & Rowle*, 248,) the very point was solemnly adjudged. Thus, we have four decisions by the court in the last resort on the one side, and what, in the shape of authority, on the other? *McPherson v. Cunliffe*, (11 *Serg. & Rawle*, 422,) only established as a general rule, that the decrees of the Orphans' Court are conclusive; of course, it has nothing to do with cases that are to be sustained by authority as exceptions. *The President of the Orphans' Court v. Groff*, (14 *Serg. & Rawle*, 181,) does not touch the point. There a son had taken land at a valuation in the Orphans' Court, and in defence to an action for the purchase money, had given in evidence the administration account, which showed a balance in favour of the executor; a decree that the land be sold to raise such balance; and an actual sale. To rebut this, there was an offer to prove, that the balance had been made up of debts contracted by the executor himself, that ought not to have fallen on the land; which was held to have been properly rejected. Thus, it will be perceived, the attempt was to impeach, not merely the confirmation of the administration account, which was only inducement, but *decree of sale*, which every one admits to be conclusive. The ground of the defence was failure of consideration, occasioned by the land having been swept away by the debts; and to have disproved the existence of the debts, while the sale was permitted to stand, would have been nothing to the purpose. The object of the proof was to reverse the decree of sale collaterally, on the ground of mistake in the premises on which the Orphans' Court had adjudicated; and in delivering the opinion of this court, my brother ROGERS seems to have been studiously explicit in putting the decision on the conclusiveness of that decree: so that the case is an authority for nothing else. As to opinions at *Nisi Prius*, if these were entitled to the weight of a feather, the account would be balanced; my brothers ROGERS and HUSTON, having determined the matter in the one way, and my brother TON and myself in the other. In *Sutton v. Connolly*, (1 *P. A. Browne's Rep.*, Ap. 65,) it seems, a decree of confirmation was deemed conclusive. The report of this case, is a memorandum, furnished by counsel, of the decision of an inferior court: on the abstract ground of authority, it is entitled to no weight. As respects *Blount v. Darragh*, (14 *Serg. & Rawle*, 184, *note*,) ruled by Judge WASHINGTON in the same way, it is fair to remark, that the cause was decided on abstract principles, without recurrence to the decisions of the state courts, which, as to local matters, it is well known, are usually followed by the federal courts. Had the decisions of this court been produced, it is not too much to believe, that the learned judge would have decreed differently. This is the sum of authority on the one side and on the other; and in opposition to two cases which are not binding authority, we have an unbroken series of decisions by the court in the last resort, for more than thirty years. And

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for what purpose change what had thus become the law of the land?—not to reach the justice of the case, but to interpose an obstacle to it—and all for the sake of consistency in respect of an abstract principle. Of this, the case in which the change is proposed to be made, is a pregnant instance. By refusing to unravel the account, the defendant is precluded from showing what he is now fully prepared to prove, that very important items for which the defendant obtained credit as advancements, were in fact, debts due the estate, with which he ought to be charged.

It is notorious, that settlements in the Orphans' Court are frequently, in effect, *ex parte*, while the examination of the account is rapid and superficial. The accountant consequently has the ball at his foot; and under such circumstances to conclude infants destitute of guardians, or perhaps a friend to see justice done, must let in a flood of injustice, the extent of which cannot be anticipated. Errors may doubtless be corrected by the Orphans' Court itself; but, important ones, as in the case before us, may, for the first time, be discovered during a trial at law, and these would necessarily be without remedy.

Of what use, it has been asked, is a settlement, if the account be subject to re-examination? Even the exhibition of an account is a substantial benefit; and, this being under the sanction of an oath, gives it the advantages of an answer in chancery. But certainly enough for the purposes of justice is gained by making the account *prima facie* evidence, and imposing on those who would impeach it, the burthen, of proving distinctly the existence of error. It may be convenient, and, in actions for distributory shares, produce an equality of recovery among the parties entitled, to abide by the decree of confirmation; but this convenience will, I fear, be enjoyed at the expense of justice.

New trial granted.

[LANCASTER, JUNE 5, 1828.]

THOMAS WATSON and others *against* MERCER.

The Supreme Court, when sitting out of the county of *Philadelphia*, cannot entertain a writ of error for error in fact.

THE opinion of the court was delivered by

TOD, J.—It appears to us that a writ of error, for error in fact only, lies not in this court in this case. It is settled by all the authorities, that matters of fact, when alleged for error, must be tried by jury, and not otherwise. The law has given us no jury in this district; therefore, in our opinion, it has given us no jurisdiction in this case. Nothing can well be imagined more nugatory than to

(Thomas Watson and others v. Mercer.)

affect an authority which must exist only by the consent of the party complained of. It certainly must be but a pretence of jurisdiction which can be stopped by the bare denial of the defendant. As soon as issue shall be taken upon the facts asserted by the plaintiffs, we are at a stand. To support the writ, the cases of *Silver v. Shellback*, (1 Dall 165,) and *Moore v. M'Ewen*, (5 Serg. & Rawle, 373,) have been relied on. To be sure, the error alleged in those cases was error in fact only, and precisely such as here, viz., that the party complaining being an infant, had appeared in the court below by attorney. But those cases arose in *Philadelphia*, where our system of jurisprudence gives this court a jury to try contested facts. There the court took in hand what they had the means of completing. Here our jurisdiction can be effectual only in case the party charged shall think fit to confess himself in the wrong. We have no jury here; no venue for which they may be summoned; no names in the jury box for this court. To send the matter for trial to the Court of Common Pleas, or the District Court, would seem to be without any precedent existing in this state, or any where else. The Circuit Court has been suggested as a fit place for the trial; but the acts of assembly establishing that court, appear not to afford the semblance of authority for such removal of the cause. That court is not an emanation from this. It is not a Court of *Nisi Prius*. Its jurisdiction is defined by the acts of assembly, and there is no provision, express or implied, for removing a question on a writ of error pending here into the Circuit Court for trial.

Therefore, having no means, in this district, of deciding upon alleged errors of fact, we follow the authority of *The Commonwealth v. Smith*, (4 Binn. 117.) That case called much more strongly than the present for the interference of this court. A rule for an information, in the nature of a *quo warranto*, was applied for. There was no other possible mode of redress known to the law. The application was denied solely because this court, sitting, as it then was, out of *Philadelphia*, had no power of summoning a jury, and because the defendant, merely by denying the facts, could put an end to the proceeding.

It has been made a question in the argument, whether a writ of error, *coram nobis*, lies in the District Court, or in the Court of Common Pleas. We do not decide that question, nor can we; it not being upon the record. We are of opinion that this writ of error, being for error in fact only, be quashed.

AUG 12 1888

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

MIDDLE DISTRICT, JUNE TERM, 1828.

[SUNBURY, JUNE 17, 1828.]

TODD, Administrator of BEALE, to the use of DOYLE, *against*
PATTERSON.

An appeal does not lie to the Supreme Court from a judgment of the Circuit Court, on the plea and issue of *nul tiel* record.

APPEAL by the plaintiff from the judgment of the Circuit Court for *Mifflin* county.

This case was originally an action of debt brought by *Thomas Beale*, for the use of *E. W. Doyle*, against *John Patterson* and *William C. Kelly*, trading under the firm of *Patterson and Kelly*. It was arbitrated at the instance of the plaintiff, and on the 26th of *June*, 1821, (on which day the arbitrators met by the agreement of the plaintiff and *Kelly*, the day to which they stood adjourned, having passed without a meeting,) the arbitrators reported, "that there appeared due the plaintiff, *Thomas Beale*, for *E. W. Doyle*, the sum of four hundred and thirty-six dollars and seventeen cents, being the amount with interest of two sales made to *Patterson* and *Kelly*, on two writs of *venditioni exponas*."

Docket Entry.—"Report filed *June* 26th, 1821, for the plaintiff, for four hundred and thirty-six dollars and seventeen cents. Same day the defendant, *W. C. Kelly*, appealed. See recognisance, &c."

The recognisance of appeal was in the usual form, by *W. C. Kelly* and *Robert McClelland*, conditioned that the said defendant shall pay all costs, &c., or in default shall surrender the defendant, &c.

(Todd, Administrator of Beale, to the use of Doyle, v. Patterson.)

Thomas Beale died, and *Thomas Todd*, as his administrator, issued a *scire facias post annum et diem*, against *John Patterson*, to *January* term, 1825, to which the defendant appeared and pleaded *nul tiel record*.

Issue being joined on this plea in the Circuit Court, *ROGERS, J.*, after argument, gave judgment for the defendant.

Hale moved to quash, on the ground that an appeal from a judgment on the plea of *nul tiel record*, does not lie from the Circuit Court. The fourth section of the Circuit Court law specifies the particular case in which appeal lies, and this case is not included.

Fisher, contra.—The court will incline in favour of an appeal on the merits in preference to the writ of error, which is an imperfect remedy. He then contended, that there was such a record. No matter how irregular the proceeding, there was a judgment. 2 *Serg. & Rawle*, 107. 1 *Serg. & Rawle*, 492. 8 *Serg. & Rawle*, 157.

Hale, in reply, referred to 1 *Serg. & Rawle*, 19, 22, and contended, that if *Kelly* had power to revive the rule as to both, he had power to appeal as to both. 14 *Serg. & Rawle*, 226.

The opinion of the court was delivered by

GIBSON, C. J.—I consider this point, as having, in effect, been decided during the last term in *Lancaster*, when it was determined that an appeal lies only where it is specifically given by the act of assembly; and judgment on the plea of *nul tiel record*, is not among the enumerated cases. By having a motion to set aside the judgment overruled below, a party might squeeze his case into the letter of the act; but he would be met here by a question, whether the motion to set aside were the proper remedy. If it were, a writ of error would be superfluous whenever the court below should be willing to reverse its own judgment in a summary way; which would, in fact, be to allow it all the jurisdiction that it could exercise on a writ of error, *coram vobis*, which it has been determined does not lie to an inferior court; and that would deprive the party who had obtained the judgment, of his constitutional right to have the matter determined in a superior court. The present is no doubt a *casus omissus*; but the purposes of justice do not require us to violate the letter. In cases like the present, the writ of error affords a remedy equally beneficial. I admit, that since the act of 1806, a remedy provided by the legislature must be pursued in exclusion of remedies at the common law, and consequently that an appeal wherever it lies, must be pursued in exclusion of a writ of error; but it is assuming the very point in dispute, to affirm that an appeal lies in the particular instance. As, then, the case is not within the terms of the act, and remedy may be had as fully as if it were, we are of opinion this appeal cannot be sustained; and it would therefore be extra-judicial to express an opinion on the question intended to have been submitted.

Appeal quashed.

[SUNBURY, JUNE 17, 1828.]

INGRAM and others, Executors of MITCHELL, against
SHERARD.

IN ERROR.

11 Cases, 260.

To constitute a mutual account within the exception in the statute of limitations, there must be reciprocal demands: it does not apply where the demand is altogether on one side, though payments on account have been made.

ERROR to the Court of Common Pleas of *Mifflin* county, in a suit commenced in *July*, 1825, before a justice, on book account, brought by *James Sherard* against *William Ingram* and *Robert Ingram*, executors of *Robert Mitchell*, deceased; pleas *non assumpserunt*, and the statute of limitations.

The plaintiff gave in evidence his book of original entries, containing the following items:—

<i>August</i> , 1809.	1 Coffee pot,	-	-	-	\$1,12½
<i>May</i> 17th, 1812.	2 Barrels of shad,	-	-	-	\$28,00
Do. do.	3 Pounds of coffee,	-	-	-	\$1,00
<i>November</i> 7th, 1819.	7 Half gallons of whis-				
key,	-	-	-	-	50
					<hr/>
					\$36,62½
<i>August</i> 16th, 1804.	Half a yard of calico,	-			40
					<hr/>
					\$31,02½
Cr. <i>Nov.</i> 17th, 1812,	by cash,	-	-	-	\$20,00

The court below instructed the jury,—

That where there have been mutual dealings, and some of the items are within the six years, they will draw after them the preceding items that are beyond six years.

Here there is a charge within six years. There is no credit within six years: there is a credit beyond the six years, and the question is, whether this item takes the case out of the statute. The court thinks it does, and if the jury are satisfied with the proof, they will give a verdict for the balance of the account with interest, from a reasonable time after the dealings ceased.

To which opinion of the court, an exception was taken by the defendants.

The opinion of the court was delivered by

ROGERS, J.—Conceding that this is such an account as concerns the trade of merchandize, between merchant and merchant, their factors and servants, is it a mutual account so as to bring it within the exception of the statute? The principle which governs this case was ruled by Justice DENNISON, in *Coates v. Harris, Bull.*

(Ingram and others, Executors of Mitchell, v. Sherard.)

N. P. 149. The clause in the statute of limitations about merchants' accounts, extended only to cases where there were mutual accounts and reciprocal demands against two persons. There were no mutual and reciprocal demands between *Sherard* and *Mitchell*. The demand was altogether on one side; for *Mitchell* had no account whatever against *Sherard*. He had, it is true, paid him twenty dollars on account, for which *Sherard* had given him credit, more than six years before the institution of this suit, but this does not constitute a reciprocal demand within the meaning of the court in *Coates v. Harris*, but is a payment in part of *Mitchell's* account.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 3, 1828.]

The UNITED STATES *against* BARBER.

IN ERROR.

The United States, when plaintiffs in court, are entitled to appeal from an award of arbitrators without affidavit or security, and without paying costs.

ERROR to the Court of Common Pleas of *Union* county.

Action of debt by the *United States* against *Robert Barber*, in which case an award was made by the arbitrators appointed under the act of the 20th of *March*, 1810, of no cause of action. The plaintiffs entered an appeal without paying costs or giving any recognisance, and on motion of the defendant, the court below struck off the appeal.

Bellas, for the plaintiffs in error.—The *United States* are not bound to pay costs or enter recognisance as other persons. The *United States* were said below to come into court as other citizens. We say they are sovereign. A sovereign is not bound to pay costs. 1 *Com.* 272. 3 *Com.* 400. 11 *Rep.* 74. 1 *Com.* 88. A statute naming inferior orders, does not extend to superior. *Federalist*, 440, 441, No. 81, by *Hamilton*. A sovereign power is not suable: it cannot be mulcted in costs without its consent. If the court could adjudge costs, it could adjudge damages. The arbitration act did not extend to corporations or executors. 2 *Binn.* 267. 5 *Binn.* 508, 510, 511. 3 *Dall.* 301. 3 *Cra.* 91, 92. *Fed.* 443, 446.

Merrit, contra.—There is no provision of congress on the subject. The *United States* choose to descend to the level of an individual when they enter our courts. The sovereignty of the *United States* might, according to this doctrine, oppress the citizens by unfounded suits. The *United States* are certainly bound by the act, otherwise their suits cannot be arbitrated at all. They may submit themselves to our laws by consent, and they have done it.

(The United States v. Barber.)

The opinion of the court was delivered by

GIBSON, C. J.—The government of the *United States* is constituted of state sovereignty set apart for national purposes; and being a part of the government of each of the states respectively, it is not to be treated as a foreign government. It is sovereign in every sense of the word; and we cannot, therefore, compel it to appear to an action, pay costs, or without its leave, put it on a footing with ordinary suitors. If it were subject to execution, the property of the nation might be taken in satisfaction of a private debt, even by a constable under the authority of a justice of the peace. Such a power in the judiciary of a state, would be destructive of the cardinal objects of the federal compact. But as the nation is provided with a judiciary of its own, the states may allow it the use of their courts on their own conditions, or interdict it altogether. While the government descends to the level of a suitor, it necessarily divests itself of the attributes of sovereignty so far as to authorize the tribunal to pass on its claims. Hence, where it sues, it submits itself beforehand to all such rules and regulations as are prescribed in similar cases: and where it thinks proper to appear as a defendant, it necessarily subjects itself to the judgment of the court, although not to execution. It has been held, that the government of the *United States* is bound to conform to municipal regulations in respect of land which it holds, not as a sovereign, but as an individual. (*The Commonwealth v. Young, Journ. Jurisp.* 47.) Hence, did an intention to subject the *United States* to all the provisions of the arbitration act, distinctly appear, we would be bound to enforce it. But such an intention is by no means clear. The first arbitration act was held to be inapplicable to corporations, for reasons that hold with equal force in respect of all artificial persons; yet, when the legislature undertook to remedy the defect, they went no further than to provide for the case of corporations specifically: consequently; those provisions are not, even on strict rules of construction, applicable to sovereignties, although corporations, because they are of more than equal dignity. But where the intention is at all open to interpretation, the curtesy which prevails among even independent states, ought to be decisive. In a system so complicated as ours, conflicts will always ensue from an intemperate use of power. Our national compact is founded in the very spirit of compromise; and to accomplish the paramount objects of the union, it will be essential in cases of doubtful right, for the depositaries of authority, whether state or federal, to abate something of what might otherwise be their legitimate pretensions: else every collision must end in a convulsion.

In *Buckwater v. The United States*, (11 Serg. & Rawle, 193,) it was determined that the arbitration act does not embrace actions on penal statutes; and, hence, it might, to say the least, be doubted

(The United States v. Barber.)

here, whether the reference were not altogether void; in which state of the case, the cause would be still depending without the appeal. But that point is not before us; and on the question submitted, we are of opinion that the *United States* are entitled to appeal without the affidavit or security required in other cases, and without payment of costs.

HUSTON, J., dissented.

Judgment reversed, and the appeal reinstated.

[SUNBURY, JULY 3, 1828.]

READ *against* GOODYEAR and others, Executors of
GOODYEAR, deceased.

IN ERROR.

Where land for which a warrant has issued, has been sold for taxes, and the warrant holder makes no claim for twenty-one years, and does not pay nor offer to pay the taxes accruing during that time, it may be left to the jury to presume an ouster of him or abandonment by him.

Lapse of time strengthens a title founded on a sale for taxes.

Where a shifted warrant is surveyed, but the survey not returned nor efforts shown to have it returned, a resurvey made for an adverse claimant under a sale for taxes, accrues to his benefit and not to the benefit of the warrant holder.

THE opinion of the court was delivered by

ROGERS, J.—The facts as proved and offered to be proved, appear to be these:—The plaintiff gave in evidence a shifted warrant to *George Pinson*, for four hundred acres of land, on which a survey had been made, but not returned. A re-survey, dated the 10th of *December*, 1813, made by the deputy surveyor for *Thaddeus Goodyear*, under whom the defendants claim; a deed from *George Pinson* to *Charles Bitters*, and a deed from him to *John Read*, the plaintiff. The defendants then offered in evidence a warrant from the commissioners of *Luzerne* county to *Benjamin Dorrance*, sheriff of the county, dated the 5th of *July*, 1803, for the sale of unseated lands for payment of taxes, which included the tract in question; a sale by the sheriff on the 28th of *November*, 1803, to *William Ross*, a conveyance by him to *Thaddeus Goodyear*, and a payment of taxes by *Goodyear* up to the commencement of the suit. The defendants further offered in evidence a deed from *Thaddeus Goodyear* to *James Black*, for two hundred and sixteen acres and one hundred and fifty-six and a half perches, situated in the north part of the tract which *Black* took possession of and lived on for the space of ten years, and that he cleared thirty acres of the said tract. The plaintiff had neither paid any tax during the whole period, nor had he offered to pay taxes, either before or since the commencement of the suit.

(Read v. Goodyear and others, Executors of Goodyear, deceased.)

If the plaintiff can recover under such circumstances, it is obvious it would be a premium for non-payment of the county rates and levies. He would recover back his lands, without having paid, or offered to pay one cent of the county assessments, for the defendant will have sustained these burthens for his benefit. For thirty years he has abandoned all claim; and, in all probability, we should not have heard of this suit, had it not been for the increased value, arising from the settlement of the country. It should be an unbending principle of law, which would sanction the recovery in favour of a person so negligent of his rights, and the duty imposed upon him, against the holder of the land who has regularly paid the burden assessed for public purposes. "If one claiming by warrant and survey, omit to pay one part of his taxes for twenty-one years, and suffer one who has entered without title, and settled on the land, to pay the whole taxes during that whole period, the jury may presume he was ousted, and he will be bound by the act of limitations." 10 *Serg. & Rawle*, 306. This, it is true, is not the point of the case, and, therefore, not cited as a binding authority; but it is referred to for the good sense in the *dictum* of the learned judge. This, however, is stronger than the case supposed. *Thaddeus Goodyear*, who purchased the land from *Ross*, entered at least under claim of right. He regularly pays the taxes assessed, for upwards of twenty-one years, and during the whole of that time, there is no claim or pretence of claim on the part of the plaintiff. He does nothing to perfect his title, nor does he by any one act manifest an assertion or pretence of interest in the land. The jury might, therefore, (had the evidence been received by the court,) have presumed an ouster, which would have barred the right of the plaintiff by the act of limitations. The conduct of the plaintiff is evidence of an abandonment, particularly as connected with the fact, that the survey on this shifted warrant was made but never returned. Whenever the person who has the right, confesses himself out of possession, the act of limitations runs against him, because there is sufficient evidence of his being ousted, although the land be not enclosed by his adversary. 10 *Serg. & Rawle*, 306. And this confession may be as well made by actions, of which the jury may judge under the direction of the court, as by words.

Several bills of exceptions have been taken to detached parts of the evidence offered by the defendant, and overruled on the ground, that, "an exact and punctual adherence to the laws, can alone de-vest the title of lands on a sale for non-payment of taxes." That a minute conformity to the laws in ordinary cases, must be proved under the act of 1796 and 1804, is too well settled to be now shaken, but that that principle under the facts, governs this case, may well be doubted. It has not, so far as my researches have extended, yet had the benefit of a judicial decision, whether lapse of time may not alter the rule and throw the *onus* on the warrant holder.

(Read v. Goodyear and others, Executors of Goodyear, deceased.)

That there must be some limit when courts of justice should apply the maxim, *omnia presumuntur rite acta*, will appear from the consideration, that otherwise, the longer the possession, the weaker the title. After the lapse of twenty-one years, it is almost impossible to prove a literal compliance with the act, and to exact a punctual adherence to the letter would be equivalent to saying that a sale for taxes should not be supported. It would only be necessary to lie by until the evidence of the regularity of the sale was lost, when a recovery would be the necessary consequence. Time would strengthen the title of the warrant holder in the same proportion that it weakened the title of the vendee of the land. A title acquired by time alone, independently of the act of limitations, is regarded in law and equity. Thus a defendant would avoid an estate for want of livery of seisin, but because the plaintiff enjoyed it twenty-five years, it was decreed he should enjoy it quietly. *Toth.* 54, *S. C.*, cited in *Vern.* 196, where it is said, after such a length of time, the court will presume livery. So, a plaintiff had forty years' possession of a piscary; the court decreed the defendants to surrender and release their title to the same, though the surrender made by the defendant's ancestor was defective, *Penrose v. Trelawney*, cited in *Vern.* 196; and after forty years' possession of a copyhold under a will, there appearing no surrender to the use of such will, the court decreed the want of a surrender should be supplied. *Vern.* 195. *S. C.*, 2 *Ch. C.* 150. The plaintiff sought to have a conveyance of his father's estate set aside, which was made twenty years since, when the father was eighty years old, and *non compos mentis*; the court declared, that after twenty years and two purchases, it was not proper for this court to examine a *non compos mentis*, and dismissed the bill. 1 *Ch. R.* 40. A bill of review to reverse a decree made sixteen years ago. The court, in regard the decree was made so long since, and nothing done against the same in all this time, would not reverse it. 1 *Ch. R.* 139, *S. P.* 2 *Cl. Rep.* 48.

A common that has been enclosed thirty years, shall not afterwards be thrown open. 2 *Vern.* 32.

For a number of similar instances in which equity regards length of time, I would refer generally to *Francis's Maxims in Equity*, *Maxim* 10, page 38.

So, also, courts of law pay especial attention to rights acquired by length of time, as will appear by reference to adjudged cases in our own reports. Although it has been doubted whether a legal prescription exists in *Pennsylvania*, yet the doctrine of presumption prevails in many instances. *Young v. Collins*, 2 *Brown*, 298, and vide *Tod v. Strickler*, 10 *Serg. & Rawle*. When a person has been absent many years without being heard of, and no circumstances appear to account for it, the jury may and ought to presume his death. *Miller, et al. v. Beates*, 3 *Serg. & Rawle*, 490. In the same case it is decided, that there is no distinction between

(Read v. Goodyear and others, Executors of Goodyear, deceased.)

real and personal property. *Strickler v. Tod*, 10 *Serg. & Rawle*, 68, bears the nearest analogy to the point now under review. In the case of the erection of a mill in a new country, if it were necessary to presume a grant of all water necessary for its use, the court would have no hesitation in instructing a jury to presume it. And this in analogy to the statute of limitations, for the court say, it is well settled, that if there has been an uninterested exclusive enjoyment above twenty-one years, of water in any particular way, this affords a conclusive prescription of right in the party so enjoying. In case of easements and other incorporeal hereditaments which do not admit of actual possession, the period required by law for a bar by the act of limitations, is usually esteemed as sufficient ground for presumption. *Kingston v. Lesley*, 10 *Serg. & Rawle*, 391. The rational ground for a presumption is where from the conduct of the party, you must suppose an abandonment of his right. Here, in consequence of lapse of time, the evidence should have been received and the jury should have been left to presume an ouster, and whether, under the circumstances, there was not an abandonment of all right to the land by the warrant holder.

The Court of Common Pleas seem to have been of the opinion that the resurvey made by the deputy surveyor for *Thaddeus Goodyear*, inured to the benefit of the owner of the warrant. Why the survey was not returned, we are not informed, probably because the surveying fees were not paid. This was a shifted warrant which, calling for lands some forty miles from where the survey was made, may be considered as a right inceptive merely, until the return of the survey.

In the case of the *Lessee of the Reverend John Ewing v. Daniel Barton*, 2 *Yeates*, 318, it was decided, that one not pursuing his application with diligence, shall be postponed. And that an application, whereon the party has not attempted to make a survey, is within the limitation act of the 26th of *March*, 1785, though the adverse party has obtained a survey thereon. The court say, though there is a survey on the application, it is not shown that it was effected by the lessor of the plaintiff, or that he ever attempted to make one, and, therefore, it shall not inure to his benefit. The survey is adverse to his title. The analogy of the cases consists in this: the warrant did not call for the land. Survey had been made, but not returned; there was the attempt, but not a completion of the title; they have not followed up their inceptive right with due diligence, but have been guilty of neglect and laches, and have forfeited their pretensions to the land. The re-survey was not made for the benefit of the plaintiff, not at his expense, but for the benefit of *Thaddeus Goodyear*, as was expressly proved. The re-survey cannot, therefore, inure to his benefit, as was decided in the case cited.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JULY 3, 1823.]

MASSER and others *against* STRICKLAND.

IN ERROR.

A judgment against a constable for official misconduct, is conclusive against his sureties as to his misconduct and the extent of damage sustained by the plaintiff; but they may take advantage of any defence personal to themselves. It seems the law is the same as to sheriffs and their sureties, but query.

THIS was a writ of error to *Northumberland* county; by the return to which, the action appeared to be an appeal from the judgment of a justice of the peace, on a *scire facias* against the defendants below and plaintiffs in error, as bail of one *Joseph Richardson*, formerly constable of *Sunbury*. At the trial, the plaintiffs offered in evidence the record of a judgment for the same cause of action against *Richardson*, the constable, to which the defendants objected, but it was admitted, and the court sealed a bill of exceptions. The defendants in turn offered to prove, that *Row*, the person for whose debt the constable had become liable, being in custody of the constable on an execution at the suit of *Strickland*, the latter went with the constable and *Row* to *Charles Hegins*, who assumed to pay the debt; in consequence of which, *Strickland* ordered the constable to proceed no further, but discharge *Row* from custody. This evidence was overruled, and the court sealed another bill of exceptions.

Greenough, for the plaintiffs in error.

Frick, for the defendant in error.

The opinion of the court was delivered by

HUSTON, J.—The defendant in error, who was plaintiff below, had brought a suit in the year 1818, before ——— *Martin*, Esq., against *Andrew Row*, on which he obtained judgment, and on the 30th of *September*, 1818, issued execution, which was put into the hands of *Joseph Richardson*, constable of the proper township. The money not being paid, *Strickland* had a *scire facias* issued against *Richardson* for neglect of duty; and on trial before the justice obtained judgment against him on the 21st of *September*, 1821, for thirty-five dollars and forty-one cents, and one dollar and six cents costs. Execution issued thereon, and *Richardson* was arrested, having no goods or lands was imprisoned, and soon after discharged under the laws for relief of insolvent debtors.

Richardson, when appointed constable, had given bail, and *Masser*, *Gobin*, *Painter* and *Haas*, were the bail. *Strickland* then, under the act of assembly, proceeded by *scire facias* against them; the cause was carried to the Common Pleas by appeal. At the trial in court, the plaintiff offered in evidence the record of the justice, of the trial before him, against the constable, the execution and ar-

(Masser and others v. Strickland.)

rest, and discharge as an insolvent debtor. This was objected to, but admitted, and exception taken. This exception has not been insisted on in this court; it is an instance of the practice, too common in some parts of this state, of delaying the cause, and encumbering the record with a bill of exception to every particle of evidence given on each side. The evidence was not only proper, but strictly legal in its nature, and necessary in the cause, and expressly required and directed by the act of assembly hereafter cited.

The defendants then offered to go into evidence to prove, that in fact, the constable, *Richardson*, whose bail they were, had not been guilty of any neglect or misconduct, but had proceeded strictly according to the directions of *Strickland*, the plaintiff. This testimony, on objection to it, was overruled by the court; "We will not," say the court, "inquire into the validity of the judgment before the justice against the constable, who might have taken his appeal or *certiorari* to that judgment. The judgment we consider valid until legally reversed."

The defendants then gave no testimony, and the court told the jury: "We are of opinion the plaintiff is entitled to recover the amount of his judgment against the constable for neglect of duty, against the defendants, his bail; the judgment against the constable remaining unappealed from and unreversed." The rejection of this evidence, and the opinion as to the effect of the judgment against the constable, in this cause, were the errors relied on here.

I shall consider the matter as it would be, independent of our act of assembly, and as it is under the act. There are many cases in our books relating to the question, in what cases a judgment shall be binding on those not parties to it on the record; and to what extent, and in what respects it shall be binding; and it would require some time, and not a little reflection, to bring them all within any rule or rules.

I shall not go into the general question, or pretend to cite or reconcile all the cases. Perhaps we do not find in the books any cases where the situation of the parties is precisely the same with that of sureties for officers under our acts of assembly; and there is also some difference in the nature and extent of the liability to which the bail of different officers are subjected; and also some difference in the remedy, the form of action, and the proof which may, or must, be adduced to obtain redress for those aggrieved.

These bonds have been likened to covenants of warranty, and cases are cited to show, where the record of the eviction of the person warranted is evidence, and how it is evidence against the warrantor, who had not had notice, or who has notice of the suit, and been called on to defend it. In most cases it is necessary to prove an eviction, in order to support a suit on the warranty, and in such cases the record of eviction is always evidence, and evidence of the utmost importance. For the purpose of proving the fact, that the person has been evicted, it is always evidence: how

(Masser and others v. Strickland.)

far any additional efficacy is given to it, by proof of notice to the warrantor, or in what cases, or whether in any case, except where obtained *per fraudem*, it is liable to be questioned, I shall not stop to examine.

These bonds have also been compared to bonds of indemnity, to which, perhaps, they have a nearer resemblance. In these there is no need, except, perhaps, for the purpose of recovering the costs and expenses of the suit against the person indemnified, to give notice. The record of a suit, and verdict, and judgment, against the person indemnified, is evidence both of the fact of damage and the extent of it, in a suit on the bond of indemnity, whether notice was given and the party called on to defend it or not. 1 *Saund.* 116, and notes. Those who have undertaken to save a man harmless, are considered as bound to take notice of any suit against him, or perhaps, as contracting to take notice, or as contracting expressly to save harmless, whether they have notice or not; and, as agreeing to trust to the person indemnified the management of the defence, if suit is brought against him. A bond nearly of this nature was considered similar to a bond of indemnity in 6 *Johns.* 158, where it is intimated, that the doctrine of *res enter alias acta*, does not apply to the case of principal and surety. In that case, however, notice had been given, and the decision was, that the judgment was conclusive that the plaintiff had been damaged, and of the extent of damages. The matter was considered again, 7 *Johns.* 168. In that case also, notice had been given of the suit against the sheriff, and the defendant had co-operated in the defence, and the decision was held conclusive of the damages and of the amount thereof. I apprehend, however, from the reasoning of Chief Justice KENT, page 171, that the decision must have been the same if no notice of the former suit had been given to the defendants in the cause trying. His case did not call for an opinion on this point, but the principle cited above from *Saunders*, 116, and the case 6 *Johns.* 158, and the case in 7 *Johns.*, all led to the conclusion, that either from the relation and engagements of the parties, or from privity, the judgment against the officer would, unless obtained by fraud, have been conclusive of the officer's liability, and of the extent of it.

These official bonds are always joint and several. If the officer is sued first, and a judgment obtained against him, and on failure of obtaining satisfaction, suits are brought against the sureties, I apprehend, judgment could not be obtained for a larger sum against them than had been recovered against the officer. The verdict and judgment against him might be used by them to limit the extent of the plaintiff's claim; if it could not, the case of sureties would be alarming. The plaintiff's demand, as shown by his execution, may be large. The sheriff alone can show how much of the defendant's goods he found; whether those goods were in whole or in part subject to claims for rent, or to prior levies on other executions, in the hands of the same or a different officer. If any money

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were paid the plaintiff, this, and the evidence of it, must be peculiarly within the knowledge of the sheriff. A judgment against him for a small sum must then protect his sureties from paying a much larger, and if the judgment is evidence to protect them, it must be evidence against them; not conclusive in all respects, for they may plead *non est factum* to the bond, a release, the statute of limitations, &c. &c., but conclusive either for or against them of the fact, that the officer has not performed his duty, and of the damage for which he and his bail are liable. I am aware, that the case of *Camack and others v. The Commonwealth*, 5 Binn. 184, may be cited as containing a contrary opinion, and I know that the decision in this case lay over on account of that. But without going into a minute investigation of that case, or showing in what respects it differs from this, I may say, the opinion and reasoning above may be left for consideration, when a case on a sheriff's bond occurs. This is on a bond against a constable's sureties, and we decide this case on the law as applying to such bond.

By the 29th section of the act of the 20th. of March, 1810, it is provided, that when a constable elect is not possessed of a freehold estate, clear of all encumbrances, worth one thousand dollars, "he shall, before being appointed, be bound in an obligation to that amount, with at least one sufficient security, to be taken, &c., for the just and faithful discharge of said office; and such obligation shall be held in trust for the use and benefit of all persons who may sustain injury from him in his official capacity, by reason of neglect of duty, and for like purposes and uses as sheriffs' bonds are usually given."

The proceedings for redress by the party aggrieved, are very different from those directed on the sheriff's bond. By section 19th, it is provided, that "any constable who has, or may hereafter give security agreeably to law, for the faithful performance of the duties of his office, and afterwards, on neglecting or refusing to perform such duties, shall have judgment rendered against him, for such neglect or refusal, and on being prosecuted for the recovery of such judgment, becomes insolvent, abandons his country, or from any other reason it becomes impracticable to recover such judgment from such constable, or when a constable makes default, and abandons his country before judgment had against him, the justice before whom such judgment or judgments stand unpaid, are hereby authorized to issue a *scire facias*, and to proceed against such bail, for the recovery of judgments had as aforesaid, in the manner constables are now suable, saving only the right of appeal to such bail." Now, the bail of a sheriff may be sued in the same writ with him, or separately, and judgment and recovery against them, or one of them, before any judgment against the sheriff. The bail of a constable are not suable, unless where he has absconded, until suit has been brought against the constable, and judgment obtained, and he is pursued to insolvency; and then not suable before the jus-

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tice, though it has been held they may be in court, by action of debt, but by *scire facias* on the judgment already obtained before the same justice against the constable. It is against all principle and all precedent, to permit a party to plead to a *scire facias* on a judgment, what had been, or might have been pleaded to the original judgment. When these men entered into this bond, they were bound to know the extent of their liability and the remedies against them. They have entered into it—have incurred the risk, and must submit to the consequence. Where the law is positive, it is in vain to talk of hardships. But I see none. This construction is more in favour of bail generally, than that contended for. If the judgment against the constable is erroneous or unjust, an appeal can be entered. The bail are not strangers to such judgment; they are bound for all the official conduct of their principal, and bound to attend to proceedings against him by their bond, and by the law; and if they were not bound by the judgment against the constable, neither would the plaintiff be; and after the constable, who alone knew of the defence, had absconded, the plaintiff might recover from them the whole amount of his debt, who had only recovered a small sum in a suit against the constable.

The judgment against the constable is, however, only conclusive of the misconduct of the constable and injury of the plaintiff; it is not absolutely conclusive against the bail, they may plead any defence personal to themselves, or any thing to show, that at the time the constable was liable they were not. As nothing of this kind was offered, the judge was right as to the evidence, and right in his direction to the jury.

GIBSON, C. J.—If the sureties are concluded by the judgment against the constable, it must be for reasons purely technical; for it assuredly will not advance the justice of the cause, to refuse them an opportunity to make their defence in this action, since they could not of right, and did not in fact, make defence to the *scire facias* against the constable.

In matters of private right, a judgment is evidence only against parties and privies. The defendants were clearly not parties. A court will undoubtedly look beyond the record, and treat as parties, all who are found to have in fact acted a part, and this whether their interference were irregular or not. Yet, except in particular cases, no one will be forced to become a party, indirectly, who could not be brought in directly; and even in the excepted cases, he must have had notice to defend. Here notice is not pretended; and had it in fact been given, the sureties would not have been bound to respect it. The notice to defend is derived by analogy from the voucher to warranty, and came into use with the personal action of covenant, when it superseded both the voucher and the ancient *warrantia chartæ*; and like the voucher, its object is a recovery over against the warrantor, with whom none but the *party against*

(Masser and others v. Strickland.)

whom the recovery has been had, has to do. Such a notice, therefore, can be given, not by the plaintiff, but the party to be defended. Here the sureties were under no obligation to the constable, much less to the plaintiff, to defend against the *scire facias*. They were, therefore, not parties immediately or remotely; and it remains to be seen, whether they stand in such privity as to be affected.

Lord COKE enumerates several sort of privies; and, among the rest, privies in *contract*, (3 *Rep.* 23, 4 *Rep.* 123.) But a recovery operates by way of estoppel, and none are to be estopped except privies in *blood*, privies in *estate*, and privies in *law*. The best elementary writers lay down the rule in the same words. (1 *Stark. Ev.*, part 1, 192, 1 *Phil. Ev.* 245.) Here privity of blood or estate is out of the question, and privity of law is spoken of as contra-distinguished from privity in *deed*; as where the law implies the relation without its being created by deed: for example, in escheat. (*Jacob's Dict. Tit. Privies.*) But the relation between these parties, which, at most, is that of principal and surety, is created directly by deed; and if there be any privity between them, it is that of *contract*, which is not admitted to be sufficient, by any court or authority whatever. In *Patton v. Caldwell*, (1 *Dall.* 419,) a special verdict in another action on the same policy, was held to be admissible only because all the underwriters had made the action their own by agreeing to be bound by the same verdict. This is in principle exactly our case. The underwriters had separately covenanted for the happening of the same contingency: and in our case, the defendants and the constable had separately covenanted for the due execution of the constable's office, just as they might covenant for the happening of any other distinct and independent fact. In other words, the constable and his sureties, like the several underwriters, were bound for the same thing, but by distinct obligations. How then shall the covenant of the surety, which is never to be stretched beyond the letter, be extended to the payment of whatever may be recovered from the principal? It is, indeed, said by *Pothier*, whose authority is relied on in *Kip v. Brigham*, (6 *Johns.* 158,) that the case of principal and surety does not fall within the rule of *res inter alias acta*. And so, indeed, are the provisions of the *French* or civil law, according to which the surety *accedes* to, and becomes bound immediately by the contract of the principal, the contract of the surety being merely an accessory of that of the principal, and the former taking the place of the latter for every purpose of responsibility, whether actual or contingent. (*Traité des Obligations*, part 2, c. 6, sec. 1.) But will any one say that such are the provisions of the common law; according to which, the surety is bound by the terms of his own engagement, without regard to the stipulations of his principal.

The case of *Camack v. The Commonwealth*, (5 *Binn.* 184,) is directly in point. There, the principal and the sureties were sued on their bond *jointly*; and it was not necessary to show, that

(Masser and others v. Strickland.)

the plaintiff had previously done all in his power to obtain satisfaction of the *principal*: these two are the only points of difference on which a distinction could possibly be attempted. But that the principal and sureties are sued together, certainly does not *weaken* the relation in which they stand by their contract. Then, that the act of assembly in cases like the present, requires the principal to have been first pursued, has the effect only of making the recovery evidence against the sureties, not of the facts adjudicated, but of the requisitions of the law having been complied with, of which the record of the recovery is the best, and consequently, the only competent evidence. Of this I shall speak more fully in noticing the exceptions to the rule which requires privity. These unessential grounds of difference being removed, *Camack v. The Commonwealth*, comes fully up to the point, and is decisive of the principle in the abstract, that the rule of *res inter alios acta*, is, in fact, applicable to the case of principal and surety. Notwithstanding a recovery against the principal, the sureties were let in to traverse the cause of action *ab origine*.

The cases which appear to be exceptions, constitute in fact, a distinct class, and are regulated by principles peculiar to themselves. The rule which requires privity is inapplicable to them, because, as it is expressed in *Gratz v. Burr*, (4 *Wheat.* 213,) the judgment is admitted not as binding the right of the party against whom it is produced, but as a link in the title: in other words, as operating not by way of estoppel in respect of any fact adjudicated, but as being itself an independent fact, and an ingredient in the cause of action, or case set up by him producing it. There can be no happier instance of the difference between the cases of this class and those of which I have spoken, than the case before us. By the act of assembly, recourse can be had to the sureties, only after every means of obtaining satisfaction from the principal has been exhausted; and the judgment is consequently evidence against his sureties to show, that he has been pursued. But because it is evidence in that respect, it by no means follows that it should be evidence of the facts adjudicated, so as to fix the sureties with the consequences of his delinquency. The common instance of a verdict against a master for the misconduct of his servant, is also apposite for the purpose of illustration. The misconduct of the servant, which must first of all be proved by evidence *aliunde*, makes him answerable for all the mischief it may occasion. But the injury which the master has suffered, is not to be estimated by what might be supposed an adequate compensation of the party who suffered in the first instance, but what the master has, in consequence, been compelled to pay. So that the verdict against the master is evidence against the servant to fix the *quantum* of the damages. The servant cannot object that less might have been recovered if he had been permitted to defend and cross-examine the witnesses. His misconduct reduced the master to the necessity of defending himself in the best

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way he could; and if, in consequence, a loss must be borne by one, it shall be by him whose act occasioned it. In that case, as in this, the amount of the loss actually suffered, is the measure of the damages. But how unlike are the two cases in every other respect? The damages recovered from the master necessarily constitute the actual injury which he has suffered, and form the standard of his compensation; but the amount recovered from the constable, is not necessarily in exact accordance with the extent of the injury. But the case of the servant would furnish a satisfactory analogy in an action by the sureties against the constable; in which a recovery by the plaintiff from the sureties, would be decisive of the *quantum* of the damages, and, provided notice had been given to the constable to defend, conclusive of the facts adjudicated. Thus, also, it is in actions on contracts of indemnity where the loss to be compensated has been produced by an adverse recovery; as in the case of special bail who have undertaken to surrender the principal or pay the condemnation money; or in an action on a warranty, which is broken by the very fact of a recovery on an adverse title. On this principle is *Bender v. Fromberger*, (4 Dall. 436,) *Leather v. Poultney*, (4 Binn. 356,) and the cases cited from the *New York* reports. Had the sureties, like special bail, covenanted to pay whatever should be recovered against the constable, the plaintiff would have made out his case by producing the judgment, which, under the terms of the contract, would have been conclusive. But they covenanted only for the due performance of the constable's office; and, it seems to me, they ought not to be precluded by any thing which has passed between the plaintiff and the constable, to whom they gave no authority to bind them, from showing that their covenant has been performed.

SMITH, J. did not hear the argument, and took no part.

Judgment affirmed.

[SUNBURY, JUNE 28, 1828.]

BOUSLAUGH *against* BOUSLAUGH.

IN ERROR.

If a husband, by deed of separation without trustees, relinquish to his wife all his right in her land, reserving the payment of an annual sum, the land is not liable to the execution of a creditor of the husband, who obtains judgment after the husband and wife have been notoriously separated for nine years.

In the Common Pleas of *Huntingdon* county, *Jacob Bouslaugh*, the defendant in error and plaintiff below, brought this ejectment for two hundred acres of land in *Frankstown* township, against

(Bouslaugh v. Bouslaugh.)

Sebastian Bouslaugh and others, plaintiffs in error and defendants below.

The plaintiff below claimed by virtue of a sheriff's sale and deed to him in *August*, 1822, of a life estate, sold under an execution issued on a judgment against *Sebastian Bouslaugh*, for a debt of *George Wisell*, in the Court of Common Pleas of *Huntingdon* county, on the 12th of *March*, 1821.

The defendants gave in evidence a deed, dated the 9th of *November*, 1793, from *J. Rench* to his daughter, *Esther Bouslaugh*, then wife of *Sebastian Bouslaugh*, conveying the land in consideration of natural love and affection to her during her natural life, and after her decease to the heirs of her body, and their heirs and assigns for ever. Then the defendants offered in evidence the following agreement between *Sebastian Bouslaugh* and *Esther Bouslaugh*, dated the 2d of *December*, 1812, and recorded the 30th of *March*, 1813, and testimony of *David Johns*, one of the subscribing witnesses thereto.

This indenture, made between *Sebastian Bouslaugh* of the one part, and *Esther Bouslaugh* of the other part, both of the township of *Frankstown*, and county of *Huntingdon*, and state of *Pennsylvania*, witnesses, that whereas some unhappy differences have lately arisen between the said *Sebastian Bouslaugh* and *Esther* his wife, and they have mutually agreed to live separately and apart from each other; and, previous to such separation, he the said *Sebastian Bouslaugh*, relinquished all claims to the estate that he has in right, by being married to *Esther Bouslaugh*, both real and personal, reserving to himself one mare, one sorrel colt, one bell cow, his own bed and bedding, on the following condition, to wit: That the said *Esther Bouslaugh* pays unto the said *Sebastian Bouslaugh* the sum of thirty dollars yearly, and every year during his life, that is to say, thirty dollars on the first day of *October* ensuing the date hereof, and then on the first day of *October* during his life; and further, the said *Esther Bouslaugh* does agree to pay all the debts now contracted for until this date, but no other. On the above conditions the said *Sebastian Bouslaugh* now quits claim to the above estate that he has in right, both in law and equity, for ever, and for ever releases unto the said *Esther Bouslaugh*, to her own proper use of these presents, and to and for no other use, intent or purpose whatsoever:—Witness our hands and seals this second day of *December*, A. D. 1812.

Sebastian Bouslaugh, [Seal,]

Esther Bouslaugh, [Seal.]

Lazarus Lowrey,

David Jones,

Alexander Lowrey.

} Witnesses present.

The facts which *Johns* was called to prove were, that *Sebastian Bouslaugh* called on *Lazarus Lowrey* and *David Jones*, to

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go with him to his wife to communicate to her proposals of separation, that at his request they went and arranged and settled these articles as written, and that they signed the same as witnesses, and that *Sebastian Bouslaugh* expressed himself pleased therewith. That the said *Esther* has complied with the conditions of said article, and has enjoyed said farm as her separate property, and brought up several of their children thereon: That *Jacob Bouslaugh*, the plaintiff, is the son of said *Sebastian* and *Esther*, and had express notice of said article: and that the said *Sebastian* withdrew from the said premises in 1812, and has not resided with her since, or on the premises, except against her will: and the debt of the said *George Wisell* was contracted long after said articles of separation.

To this evidence the plaintiff objected, and the court overruled it and sealed a bill of exceptions. A verdict and judgment were rendered for the plaintiff.

Miles, for the plaintiff in error.—The father intended this estate for the separate use of the wife. But in equity, the husband may contract directly with his wife. 1 *Pow. Con.* 64, 109. *P. Wms.* 125. 2 *Atk.* 96, 97. 2 *P. Wms.* 316. *Bunb.* 205. 6 *Serg. & Rawle*, 468. 10 *Serg. & Rawle*, 209. 3 *Atk.* 547. 5 *Day*, 47. 7 *Johns. Ch.* 57. 2 *Johns. Ch.* 539. Here we offered to prove there were no creditors to be affected by the agreement to live separately.

Hale, contra.—All contracts directly between husband and wife are void. The husband obtained credit on the life estate he had in his wife's land. Chancery will not interfere against those who are favourites. The purchaser at sheriff's sale had not notice, and although the plaintiff, who purchased from him had, yet that makes no difference. The agreement could not be recorded, because it was void—and not notice, though actually recorded. The articles could not divest the settled estate of the husband.

W. R. Smith, in reply.—If this were a devise to the separate use of the wife, there would be no doubt. But the conveyance from *Rench* was essentially to her separate use. The husband exercised no right for fourteen years before the judgment—no one was deceived.

The opinion of the court was delivered by

GIBSON, C. J.—The interest of a husband in his wife's land, is an incident of the marriage contract, as much within his power as the absolute ownership of her chattels, which he may relinquish by an agreement without the intervention of trustees; as was decided in *M'Kennon's Executors v. Phillips*, at the last *March* term. Where a creditor has not acquired an interest by judgment before the agreement to live separate, it is impossible to imagine a reason for a difference. A judgment would, undoubtedly, not be defeated by a subsequent agreement, or any other contrivance; but, where the agreement is *bona fide*, and precedes the judgment, a creditor shall not insist on the marital rights of the husband after the husband has thought fit to abandon them, and this also was determined at the last

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March term, in the case of *Starret v. Wynn*; (*ante*, 132.) I lay no stress on the conveyance to the wife being in terms which indicate an intention to restrain the rights of the husband to limits as narrow as the policy of the law will admit. The parties had been notoriously living separate for some years, which was sufficient to put creditors on their guard: so that we should presume too far to say, the debt was contracted on the credit of a supposed interest in the land. At all events, if this could avail the creditor, it was a circumstance to be left to the jury, and the evidence, therefore, should have been admitted.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 24, 1828.]

MARTIN and others *against* IVES and others.

IN ERROR.

It *seems*, that if the plaintiff appeals from an award of arbitrators, he cannot, under the act of assembly, afterwards suffer a nonsuit without the written consent of the defendant.

If a defendant give in evidence as a judgment, an award in his favour in ejectment, he is afterwards estopped from reversing it on error.

Estoppels are favoured where they promote equity, and a party may be estopped by giving a matter in evidence as well as by pleading it.

THIS was a writ of error to the Court of Common Pleas of *Tioga* county, in an ejectment for four hundred and forty acres of land, brought by *John Ives* and others, defendants in error and plaintiffs below, against *William Martin* and others, plaintiffs in error and defendants below.

The cause was arbitrated under the act of the 20th of *March*, 1810, at the instance of the defendants, and an award made, that the plaintiff had no cause of action. The plaintiffs appealed. The defendants moved the court below to strike off this appeal, but the court refused. Afterwards, the cause being at issue, and a jury sworn and affirmed, the plaintiffs suffered a nonsuit, and judgment was entered accordingly by the court.

The plaintiffs in error now assigned for error, that the plaintiffs in the court below were permitted to withdraw their appeal from the award of arbitrators without the written consent of the adverse party.

The defendants in error pleaded *in nullo est erratum*, and for further plea, that at a Court of Common Pleas of *Tioga* county, held at *Wellsborough*, in said county, in the term of *February*, A.D. 1826, the present plaintiffs in error, in connexion with a verdict and judgment between the same parties in another action for

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the land claimed in this suit, gave in evidence as a good and valid judgment, in bar of the action, the award, appeal and judgment returned on this writ of error, which he now seeks to reverse for the errors assigned, and so is estopped, &c.

The plaintiffs in error demurred to the defendants' special plea.

Wilketson, for the plaintiffs in error, insisted that by the judgment of nonsuit they were deprived of making their award as operative as a verdict: and, that the matter confessed in the plea did not operate as an estoppel.

Lewis, contra.—It does not appear that the nonsuit was voluntary—it may have been adverse, which is very different from withdrawing an appeal. But a man who pleads a matter as true, cannot deny it afterwards. 4 *Com. Dig.* 76. 13 *Co.* 62.

The opinion of the court (HUSTON, J. taking no part in consequence of a remote interest in the cause,) was delivered by

GIBSON, C. J.—Whether the suffering of a nonsuit be within the purview of the act, we do not positively determine. It certainly produces the consequences of a *retraxit*, by depriving the defendant of his remedy against the plaintiff, and stands in equal mischief. To prevent the plaintiff from eluding further responsibility by shifting his ground and setting up the award, after the defendant may have been induced to forego the right of appealing for himself, seems to have been the main object of the act. A nonsuit may be one way of withdrawing an appeal, as it certainly is one way of withdrawing from the consequences of it. In using general terms, the legislature might well be supposed to have had in view, all cases obnoxious to the same mischief. This supposition is strengthened by the undoubted fact, that it was a case of nonsuit sustained by this court in *Moore v. Hamilton*, (not reported,) which led to the enactment of the law.

But granting this point to the plaintiff in error, still it is clear, that he has ratified the nonsuit and is estopped from denying the legality of it. Had he *pleaded* the award as a final judgment, instead of giving it in evidence, there could not have been a doubt on the subject, an affirmation of record being conclusive against afterwards denying the fact. So of any other act of record; as the acknowledgment and enrolment of a deed, which precludes the plea of *non est factum*; or, the levying of a fine, which precludes an allegation that the parties had nothing. But a party may be estopped as effectually by matter *in pais*, as by matter of record. Thus, a widow, who has recovered a dower, shall not claim land settled on her in jointure; and a party may be estopped by the acceptance of rent, or by entry, or livery. References to the authorities for these instances, are to be had in *Com. Dig.*, title Estoppel. Here, in an action between the same parties, the plaintiff in error relied on the award, as having, by force of the arbitration act, the effect of a verdict and judgment, which it could not have if the appeal

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were still depending; and he shall not controvert what he himself directly asserted.

Estoppels are sometimes said to be odious; and it has been affirmed, that there is no such thing as an equitable estoppel. But the doctrine of election, which prevents a party from claiming in repugnant rights, and which has been so advantageously introduced into courts of equity, is manifestly an extension of the principle. In courts of law they are for the most part, reconcileable to the purest morality, and when they produce neither hardship nor injustice, they merit indulgence, if not favour. The conclusiveness of judgments which conduces so essentially to peace and repose, has no other foundation. The plaintiff in error had the benefit of the award as far as it would serve him, and shall not now disaffirm his solemn act in a court of record.

Judgment affirmed.

[SUNBURY, JUNE 24, 1828.]

LAMB *against* CLARK.

IN ERROR.

The plaintiff is entitled to the costs on an appeal from the judgment before a justice, for a sum due the defendant, if on the appeal the judgment in the court is, that the plaintiff has no cause of action.

WRIT of error to *Tioga* county.

The plaintiff sued the defendant before a justice of the peace, who gave judgment on the award of referees, for twenty-nine dollars and eighty-six cents in favour of the defendant, and the plaintiff appealed. In the Court of Common Pleas, the cause was submitted to arbitrators, who awarded that the plaintiff had no cause of action. The plaintiff obtained a rule to show cause why the defendant's costs on the appeal should not be struck out of the bill; but these costs were allowed by the court below; and this was assigned for error.

Mallery and *Kinney*, for the plaintiff.

Lewis, for the defendant.

Per Curiam.—The case of a plaintiff appealing from a judgment for a sum due to the defendant, is not expressly provided for in the act of assembly; but it is evidently within the spirit and meaning of the provision for an appeal by the defendant. Such a plaintiff is precisely in the situation of a defendant, his antagonist having in turn become the assailant. It may be said the plaintiff was originally in fault in suing for what was not due; but that is no justification of the unjust claim of the defendant. The demerits of the parties before the justice are exactly balanced. But the question

(Lamb v. Clark.)

is not, who was the original aggressor, but who was the efficient cause of these costs being incurred in the Court of Common Pleas. Undoubtedly, the defendant drove the plaintiff there, who, for aught that appears, would have been satisfied to be left as he began, before the justice. The plaintiff then, standing in the attitude of a defendant who has foiled his antagonist, is entitled to the costs in the Court of Common Pleas.

Judgment reversed, and judgment for the plaintiff for the costs of the appeal.

[SUNBURY, JUNE 24, 1828.]

The COMMONWEALTH, for the use of POTTER, *against*
REYNOLDS.

IN ERROR.

A suit on a sheriff's bail bond in fifteen thousand dollars, where the plaintiff's demand is less than one hundred dollars, cannot be sustained before a justice of the peace.

WRIT of error to the Court of Common Pleas of *Mifflin* county. It was originally a suit brought before a justice of the peace on a sheriff's official bond, and was removed into the Court of Common Pleas by *certiorari*, which, by consent, was changed into an appeal, and the following case stated for the opinion of the court:—

The execution of the bond by the defendant, was admitted, and that *Thomas Beale* was duly elected, commissioned, and was the sheriff of *Mifflin* county as stated in the declaration. It was also admitted that the execution in the declaration mentioned, was duly issued and put into the hands of the sheriff. That he made the levy therein stated, and did not sell on the *venditioni exponas*. That all the money has been paid to the plaintiff except the forty dollars and twenty-five cents, which still remains due and unpaid. The question for the opinion of the court is, whether the plaintiff can, under the facts in this suit, and on the pleadings in this cause, recover the same from the defendant. If the court shall be of opinion that the plaintiff can so recover, then judgment for the plaintiff for the sum found due by the justice, and interest. If the court shall be of a contrary opinion, then judgment for the defendant.

The court was of opinion that the justice had no jurisdiction or legal power to institute a suit on the sheriff's bond.

Hale, for the plaintiff in error.—The act of 1810 gives jurisdiction of *all* causes of action arising from contract, express or implied. This case is within the letter of the act and not within any of the specified exceptions. If the sheriff is sued in the Court of Common Pleas, the costs may be more than the demand. 1 *P. A.*

(The Commonwealth, for the use of Potter, v. Reynolds.)

Brown, 30. 4 *Binney*, 67. A justice may entertain suit for fees. 13 *Serg. & Rawle*, 44. In that case the suit was not on the bond, but for a sum given by statute. 7 *Sm. L.* 312, note.

Fisher, contra.—The bond far exceeds the jurisdiction: in the court the *narr.* is for the whole sum. It would be so if pleading were in form before the justice. This bond is not within the spirit of the act: the bond is to cover damages which are in the nature of a penalty. The penalty of the bond is a security for damages suffered. The principle was settled in *Palmer v. The Commonwealth*, 6 *Serg. & Rawle*, 245.

The opinion of the court was delivered by

HUSTON, J.—This suit was brought before a justice of the peace of *Mifflin* county, against the defendant, as one of the bail of *Thomas Beale*, late sheriff of the said county. The decision of the justice was in favour of the plaintiff; a *certiorari* was taken out by the defendant. This was, by consent, changed into an appeal, and a case stated, with liberty to either party to take a writ of error. The case stated admitted, that the defendant with others, executed a bond for fifteen thousand dollars, as bail of *T. Beale*, late sheriff of *Mifflin* county. That an execution duly issued from the Court of Common Pleas of *Mifflin* county to the said sheriff, and was put into his hands. That he made a levy thereon, but never sold any of the property of the defendant in the said execution, nor on a *venditioni exponas* issued thereon. That the plaintiff, however, has received all his money except forty dollars and twenty-five cents, which still remains due and unpaid. The only question was, can a suit on a sheriff's bond for fifteen thousand dollars, be sustained before a justice of the peace, where the demand of the plaintiff is less than one hundred dollars. The court below decided it could not.

The act of the 28th of *March*, 1803, 4 *Sm. L.* 45, directs that the sheriff of each county, before entering on the duties of his office, shall become bound in a recognisance and an obligation with at least two sufficient sureties, &c., and specifies the amount for each county, and the form of the recognisance and bonds, and the manner of entering and recording them, and section fourth says, all lands, tenements, and hereditaments, which such sheriffs, coroners, and their sureties shall possess, or be entitled to in any county of of this commonwealth, shall be bound by a recognisance taken in the manner aforesaid, as effectually as a judgment to the same amount in the Court of Common Pleas of all the counties aforesaid, might or could now bind the same; and whenever the commonwealth or any individual shall be aggrieved by the misconduct of any sheriff or coroner, it shall and may be lawful, as often as the case may require, to institute actions of debt or *scire facias*, on such recognisance, or actions of debt, on such obligations, against such sheriff or coroner and their sureties, their heirs, executors, or ad-

(The Commonwealth, for the use of Potter, v. Reynolds.)

ministrators; and, if upon such writs, it shall be proved what damage has been sustained, *and a verdict and judgment* shall be thereupon given, execution shall issue for so much only as shall be found *by such verdict and judgment*, &c., &c. This act evidently contemplates a trial in a court of record, and twice mentions the sum to be found by *a verdict*, &c.

At the time the above act passed, the jurisdiction of justices extended to twenty pounds; by several acts since, particularly the act of the 20th of *March*, 1810, it is extended to one hundred dollars. It provides, that justices of the peace shall have jurisdiction "in all causes of action arising from contract either express or implied, where the sum demanded is not above one hundred dollars, except on real contract where the title to land may come in question, or action on promise of marriage."

The twenty-seventh section contains a provision as to the forfeitures and penalties inflicted by certain acts. This act professes, as its title states, to consolidate all the acts relating to justices' jurisdiction, and contains in the thirtieth section, a repeal of many acts particularly specified. In no part of it does it purport to repeal any other acts than those specified.

It must be admitted that the phrase "all causes of action on contract, express or implied, in all cases where the sum demanded is not above one hundred dollars," is very comprehensive. But there certainly are many cases which it does not comprehend. Suit does not lie before a justice of the peace for a balance under one hundred dollars, due on a judgment in a Court of Common Pleas. 8 *Serg. & Rawle*, 343; nor, I apprehend, on a judgment before another justice, except in the particular form prescribed by the act, in case of the death or removal of the justice who gave the first judgment. Nor did it apply to debt for rent, except in a limited degree, until given expressly by a subsequent act of the 22nd of *March*, 1814.

The act of the 13th of *April*, 1791, directs that a judgment creditor, when debt, interest, and costs are paid, shall enter satisfaction; and if he neglects to do so eighty days after demand, imposes a penalty of any sum not exceeding the one half of the amount of judgment to be sued for and demanded by the defendant, or person damnified, in like manner, as other debts are now recoverable in this commonwealth. This court have decided in *Zeigler v. Gram*, 13 *Serg. & Rawle*, 102, that a justice has not jurisdiction in such case, though the sum demanded be less than one hundred dollars. It is there said, "in jurisprudence, the word contract is generally used to denote a bargain or agreement; and it is plain that in these acts of assembly, it was used in that sense by the legislature, who had in view those contracts which arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government." To this I will add, nor that kind of debt which arises from

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breach of duty by an officer of a court of record, and which must have been the ground of an action of trespass *vi et armis*, or on the case, unless for the provisions of the act first cited respecting sheriffs' bonds.

It has also been decided, that the justices have not jurisdiction of suits on bail bonds.

Parties and witnesses enter into recognisances before the Court of Quarter Sessions, to appear, &c. These recognisances are often taken in cases of small misdemeanors from defendants and their sureties in sums not exceeding one hundred dollars, and from witnesses almost always in sums less than one hundred dollars. These would then come directly within the words of the act of 1810: they cannot be sued in a Court of Quarter Sessions where they are taken, because that court has no civil jurisdiction. No person has yet brought suit on one of them before a justice, as I believe; nor could such, in my opinion, be sustained. The act of the 9th of *December*, 1783, section second, provides, that recognisances forfeited in Courts of Quarter Sessions, shall and may be sued for, and recoverable in the Court of Common Pleas of that county in which they were forfeited, which court may and are hereby empowered to order the said recognisances to be levied, moderated, or remitted according to equity and their legal discretion. Now, this last power of moderating or remitting, I apprehend, prevents the jurisdiction of justices who have no such power from attaching in such cases, which would otherwise come within the express words of the act of 1810.

In *Guy v. Wright*, 10 *Serg. & Rawle*, 227, an action was instituted before a justice for one third of a fuller's book, according to an article dated the 15th of *March*, 1821, not exceeding one hundred dollars. Now this was a cause of action arising from a contract express in a case where the sum demanded did not exceed one hundred dollars: the justice gave judgment for ninety-four dollars; from which an appeal was taken to the Court of Common Pleas, who sustained the appeal, and there in account render, the plaintiff recovered eighty-five dollars: but this court reversed the judgment, because the justice had not jurisdiction. "The complex machinery of an assignment of auditors, and of issues in fact and law which may be taken on the items of account, say the court, is all foreign to the tribunal of justice."

But, it appears to me the very point is decided in *Shaffer v. M'Namee*, 13 *Serg. & Rawle*, 44. That was debt against a sheriff for suffering an escape. To be sure, the action of debt is given in that case by an old statute, but which is in force here; and when brought into the Court of Common Pleas, the plaintiff might have declared on the statute or on the act of assembly: the cause of action being the same on which he claimed before the justice, either remedy was equally open to him before the justice. 10 *Serg. & Rawle*, 121. Nor was it put on that ground, but on this, that the

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justice had not jurisdiction from the nature of the subject matter. The court say, "The action is not, as had been supposed, founded on the implied contract of the sheriff, to execute his office with fidelity, but in tort. Trespass for a battery might with the same reason be held to arise, *ex contractu*, the act being a breach of the original compact to which every member of society is supposed to be a party. The "*causes of action*, express or implied," which appertain to the jurisdiction of justices of the peace, are those which arise from some agreement or understanding, mediately or immediately between the parties. It is evident, therefore, that it is not the form of the action, but the nature of the subject matter of it which must decide the question of jurisdiction. Actions of debt often arise (by act of assembly,) *ex mala fide*, and where there is not the semblance of contract between the parties;" and the decision was, that the justice had no jurisdiction.

I am unable to discover why a justice of the peace shall be excluded from jurisdiction in a case where a sheriff arrests the defendant on a *ca. sa.*, and neglects to put him in prison, and shall have it where he levies on goods and neglects to remove or sell them.

In every tribunal which has the power of giving judgment and issuing execution, it is an incident to such power that it should also have the power of compelling the officer to obey that execution, and to decide as to the application of the money when raised. In this state, and under our practice, a sheriff frequently receives an execution, and levies it on personal property, supposed to be of value more than sufficient to pay the debt. Before the sale other executions are put into his hands, and levied on the same property, and expressly often, and if not, from the nature of the proceeding and the law, subject to the first levy. This, if first levy was fair and recent; but if the first levy was not *bona fide*, or, if made under a judgment confessed *per fraudem*, the younger execution creditors may contest the propriety of paying the money to the owners of the first execution, and this may be done by the court who issued the several executions on a statement of facts agreed on, or on an issue, if facts are disputed. Can any person seriously believe the legislature ever gave, or intended to give to justices, this power of deciding on the validity of a judgment of a court of record? The first judgment, and which is alleged to be fraudulent, may be above one hundred dollars, or one thousand dollars: can this be decided on by a justice of the peace because the plaintiff before him claims only ten dollars?

The money claimed from the sheriff may have been produced from the sale of lands. Those lands may appear to be subject to prior judgments partly paid off, to mortgages in the same situation, to specific legacies charged on the said lands, to ground rents, widow's thirds, &c., &c.; can a justice of the peace, in such cases, or on questions of lien on lands, when he is expressly excluded from

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jurisdiction "*in all cases* of real contract, where the title to lands or tenements came in question." By the act of 1814, extending jurisdiction of justices to trespass on real or personal property, it is expressly provided, that if the defendant shall make oath before the trial of the action before the justice, that the title to lands will come in question, the justice shall dismiss the cause. It would be strange if on a claim of a man who had entered on the judgment docket, a transcript of a justice's judgment for fifty cents, and who would sue one of the sureties in a sheriff's bond, all the most intricate and difficult questions arising from liens legal and equitable on lands, could be brought before the justice.

By our laws, goods or lands of a decedent, may be sold by the sheriff on an execution, and when the money is brought into court, it ought, in case of insolvency of the estate, to be paid according to a certain gradation of debts in the law of 1794; and it may happen that he who issued the execution, will not be entitled to a cent of the money raised on it. The justice who has before him a suit against a sheriff or his surety, must, however, before he can give judgment, decide whether there are assets, and the mode of paying them. Now this he cannot do, for by the fourth section of this act of 1810, it is provided, that if any executor or administrator after judgment against him before a justice, shall declare that he has not sufficient assets to satisfy the said judgment, it shall be the duty of the justice forthwith to transmit the record of his judgment to the Court of Common Pleas to be entered on their docket; and the said court shall adjudge and decree thereon, and appoint auditors to ascertain and apportion the assets according to law. Now, I cannot suppose the legislature intended to give or gave jurisdiction in case of apportionment of assets indirectly in a suit against a sheriff, when they have expressly taken it from them in a direct suit against executors or administrators.

The bail in a sheriff's bond may have paid on different suits against them the whole amount of the penalty, and may be still sued for more, and to such suit may plead payment of the whole penalty of the bond: will it be alleged that any justice can decide in such a case on a bond of fifteen or twenty thousand dollars? In whatever view I can take of the matter, I am brought to the conclusion that the legislature have not given a justice jurisdiction in a suit on a sheriff's bond against either him or his sureties; that the construction heretofore put on this law is correct; that the nature of the demand, and the mode of investigation, the construction of our courts, and the whole system of our jurisprudence, equally forbid the exercise of this power by a justice, and that the judgment of the Court of Common Pleas be affirmed.

GIBSON, C. J.—By the act of 1810, justices of the peace have jurisdiction "of all causes of action arising from *contract*, express

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or implied, in *all cases* where the sum demanded is not above one hundred dollars, except in cases of real contract, where the title to lands or tenements may come in question, or actions on promise of marriage." It seems to me, the *English* language does not afford more comprehensive terms, or words better calculated to exclude all ambiguity of intention. The legislature has not only laid down a precise rule, but specified the exceptions; and after this it ought to require a strong case indeed, to induce a court to transcend its directions. There may, I admit, be cases which will justify a construction against the letter; as where the very end and purpose of the statute would be frustrated by an adherence to it, or where some shocking injustice would be done, which it may be presumed the legislature never intended. Nothing of this kind is alleged here. A justice of the peace is potentially as competent to determine an action of this sort as the judges of the Court of Common Pleas; and, if there be in fact any natural unfitness in the way, a party suffering wrong from it, has his remedy by appeal. It is convenient, no doubt, to have the matter determined in the court where the records of the transactions to be investigated, are to be found; but surely mere convenience is not a reason for dispensing with the provisions of a statute. The records or transcripts of them, may be brought before the justice with as much convenience as before the Circuit Court, where a cause of this kind, when of sufficient magnitude, may be tried; yet the inconvenience would not be sufficient to exempt the cause from removal to that court. Nor do I perceive how the authority of the Court of Common Pleas to distribute money brought into court, can qualify that court in an especial manner, to decide questions of official delinquency by its officers, which, for the most part, depends on very different considerations.

Here the defendant's responsibility in the action, arises out of his bond; and this distinguishes the case from *Zeigler v. Gram*, in which the action was for a penalty imposed by a statute. Nor can it be material that there was originally no privity of contract between the defendant and the plaintiff, who has since become beneficially interested. An action on a bond for the use of another, is indisputably founded in contract; and it is not the less so, because the penalty is a security for damages arising from a tort. It seems to me then, the cause of action here, is brought too decisively within the boundaries of the jurisdiction of a justice of the peace, to admit of its being excepted by any but legislative authority. I am therefore of opinion, that the judgment be reversed.

TOD, J., concurred with GIBSON, C. J.

Judgment affirmed.

[SUNBURY, JUNE 24, 1828.]

DENISON *against* CORNWELL.

IN ERROR.

A ward cannot, on coming of age, sustain *assumpsit* against his guardian in the Court of Common Pleas for the work and labour done by him for the guardian during his minority.

The Orphans' Court is the proper tribunal to settle accounts between guardian and ward.

In what cases the guardian is bound to compensate the minor for his services.

ERROR to the Court of Common Pleas of *Susquehanna* county.

Cornwell sued *Denison* in the court below, and declared in *assumpsit* for goods, &c. sold, for work and labour, care and diligence, money lent and advanced, and money had and received. Pleas, *non-assumpsit*, set-off and payment.

The record sets forth, that the plaintiff gave in evidence (*inter alia*,) as follows:—"That the said plaintiff went to live with the defendant when about twelve years of age, and continued to reside with him, and in his employ for about nine years, went to school some, but the principal part of the time was labouring for the said defendant, until he arrived at the age of twenty-one years. That the said *Denison* promised the mother of the said *Cornwell*, that if he would continue with him, he would do well by him, the said *Cornwell*; would school him, give him a farm, and education sufficient to study the medical profession, and that the said *Denison* expressed his satisfaction with the said *Cornwell's* conduct in his business. And the said *Cornwell* also gave in evidence the record of the Orphans' Court of said county; whereby it appeared, that the said *Denison*, on the petition of the said *Cornwell*, was duly admitted and appointed the guardian of the said *Cornwell* on the 3d of *September*, 1817, he then being above the age of fourteen years."

There was other evidence in the cause not now material.

"And the said counsel, for the said defendant, then and there, *inter alia*, prayed the said court to charge the said jury, that the plaintiff cannot recover of the defendant in this action, for services rendered by him to the defendant, while he was his ward, his proper remedy being before another tribunal."

And the said judges, therefore, refused so to charge the jury, but charged them as follows, to wit:—

"The guardian, as such, has no right to the services of his ward, and if a guardian omits to procure a proper place for his ward, but keeps him in his own employ, and agrees with the mother that he will give him a medical education and a farm, if the ward serves him faithfully, and the guardian files no account in the

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Orphans' Court, the ward, on his arrival at the age of twenty-one years, if he has laboured for the guardian and been faithful, may treat him as a stranger, and in this form of action, submit his case to this tribunal."

Exception by the defendant below. Verdict in three hundred dollars for the plaintiff below, and judgment thereupon. The error alleged and relied on, was in charging the jury that the action could be sustained.

Case and Williston, for the plaintiff in error, argued, that the question was, whether the Orphans' Court can be thus ousted of its jurisdiction—whether a settlement is not first necessary in that court? No case nor *dictum* can be brought of a suit sustained by a ward against his guardian for services. There could be no binding agreement, for there were no parties. The ward could make no contract but by his guardian. If the guardian has made a profit by the labour of the infant, he can be accountable for it in the Orphans' Court only. Will it be endured, when a man says to another, if my son stays with me till twenty-one, and the son, having no where else to go, does stay, that the father shall be sued at law upon this as upon a valid contract? The promise to the mother was no more than a promise to any other person. She had no right to the services of the boy, nor power to dispose of them. Were both parties capable of contracting; yet no procedure nor principle will support an action upon so vague a promise as that of a medical education, or a farm. Besides, the declaration was general *indebitatus assumpsit*; the evidence offered, if of any thing, was of a special agreement.

Mallory, contra.—As to there being no valid parties to the contract on account of the infancy of *Cornwell*, that might have been an argument had not the infant already performed his part in full before he sued. The plainest rule of the law is, that in dealings between one of full age and an infant, the former is bound while the infant may rescind the contract if he pleases. This is not a case of father and son, nor resembling it. I might contend, that a fair and lawful contract between father and son, executed by the son in full on his part, would be binding on the father. But the chief objection is to the remedy; they say it ought not to be sought for in a court of law, but in the Orphans' Court. I apprehend much difficulty in the way of obliging the defendant to render an account on oath of the breach of faith complained of in this action. Perhaps an action of account for the damages was never before heard of. In the Orphans' Courts particularly, accounts are rendered exclusively of property intrusted, of profits, of expenses and the like: of things which may be the subject of book-entries, and may be sworn to by the accountant. The act of assembly establishing the Orphans' Court is explicit. "They shall award process and cause to come before them all persons, who as guardians, trustees, &c. shall be intrusted with or any wise accountable for any lands,

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tenements, goods, chattels or estate belonging to any orphan or person under age," &c. Every other act giving jurisdiction to the Orphans' Court, gives it in the same language. The very last act upon the subject, in 1821, provides that a bond, if asked for, shall be given by every guardian conditioned to render an account, every three years of the management of the *property and estate* of the minor. At the common law, an account by the party delinquent on a demand of damages in a special contract, is a thing unknown. The only account required from a guardian in socage, was with respect to what was or might have been received from the *estate*, and of the expenses. So perfectly was it a matter resting in the knowledge of the accountant himself, that Lord COKE gives this reason why the action of account did not by the common law, survive against the executors of the guardian. (*Litt. Sect.* 124, 125. 1 *Inst.* 89, b, 172, a. 1 *Bac. Ab.* 32.) Beyond a question, a promise to the mother on behalf of the infant, is as valid as if made to himself personally. As little doubt is there, that on special contract for work, when the business is completed, general *indebitatus assumpsit* lies. *Bank of Columbia v. Patterson's Administrators*, 7 *Cra.* 299.

The opinion of the court was delivered by

SMITH, J.—This is an action on the case, brought by the defendant in error, *Nathaniel Cornwell*, against *Mason Denison*, the plaintiff in error, who was defendant below, in which a verdict and judgment for three hundred dollars were rendered in favour of the former. The declaration is in *indebitatus assumpsit*, and contains four counts, for goods, &c. sold and delivered, for work, labour and services, for money lent and advanced, and for money had and received. The facts were as follows:—*Nathaniel Cornwell*, the plaintiff, at the age of twelve years, went to reside with the defendant, *Mason Denison*, and continued to live with him and in his employ until he was twenty-one years old, a period of nine years. During a portion of that time he went to school, but, during the greater part of it, he laboured for the defendant, who promised his mother, that if he would remain with him, he, the defendant, would do well by him, would send him to school, give him a farm, and an education to qualify him for the practice of medicine. On the 3d of *September*, 1817, the defendant was duly chosen and appointed guardian of the plaintiff. It does not appear, whether the promise to the mother was made before or after that appointment. On the trial, the defendant's counsel prayed the court, *inter alia*, to charge the jury, that the plaintiff could not recover in this action, for services rendered by him to the defendant, while he was his ward; but, the court charged the jury, that "the guardian, as such, had no right to the services of his ward. And if a guardian omit to procure a proper place for his ward, but keep him in his own employ, and agree with the mother, that he will give him a medical educa-

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tion, and a farm, if the ward serve him faithfully, and the guardian file no account in the Orphans' Court, the ward, on his arrival at the age of twenty-one years, if he had laboured for the guardian, and had been faithful, might treat him as a stranger; and in this form of action, submit his case to this tribunal."

To this part of the charge the defendant excepted, and has here assigned it for error. The question submitted to this court, is, whether a ward, after coming of age, can sustain against his guardian, in the Court of Common Pleas, an action of *indebitatus assumpsit*, for work, labour, and services done and performed by him during his minority for his guardian—and does this action lie there? The guardian being *in loco parentis*, the power and reciprocal duty of guardian and ward, are for the time being, the same as those of a father and child, and it is not contended, that a son or child can bring or sustain such an action, for services and labour rendered during his minority against his parent. The parent is entitled to the benefit of his child's labour whilst living with him, and maintained by him. The relation subsisting between parent and child, forbids the idea of an action for such a cause; nor has any such, within my knowledge, ever been sustained. As then, the guardian comes in *loco parentis*, why then, it may be asked, should the ward recover in an action of *assumpsit*, from his guardian, for labour and services rendered during the time that he lived with him, and was maintained by him, and had a parental authority over him, when it is admitted, that a child could not, under similar circumstances, recover from a parent? A parent can bind out his son to learn a trade, either that of a farmer, mechanic, or other trade; and the same authority extends to a guardian over his ward, or perhaps, if the guardian be a farmer or mechanic, he may keep his ward, and use him as his own son; in which case, no action for work, labour, and service, can be sustained against the parent by the child, or against the guardian by the ward. The promise to the mother cannot alter the law, nor is the action attempted to be sustained on that ground. It is, however, contended, that this promise went to raise an implied undertaking by the guardian for the benefit of the ward; but the obstacle in the way of that construction is, that none, except the guardian, could enter into a valid contract for his ward. The mother clearly could not; for though entitled to respect and reverence, she had not the care of his person or estate, nor any legal control over him. As to these, she was a stranger; nor could she, by any law, consent to any contract for him, his guardian alone had the care of his person and estate, and stood at this time, as to him, in the place of a parent; he only, or with the leave of the Orphans' Court, could bind him out, and if necessary, enter into contracts for him; and hence it is, that a promise made, as in this case, to the ward, could not bind the guardian. It cannot be contended, that if a parent were to say to a stranger, "In case my son should behave faithfully to me, whilst under age, I will give him a farm

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on his arrival at the age of twenty-one years," he would be liable to an action. The son is bound in filial duty to behave so, and the parent's promise would be wholly without consideration. Neither would a guardian, in *loco parentis*, be liable to an action by his ward on such a promise. As, therefore, a son, who had rendered services in his minority to his parent, could not, on his coming of age, treat his parent as a stranger, and sustain an action for such services against him; so, a ward cannot maintain an action for similar services on his arriving at the age of twenty-one years, against his guardian, with whom he has lived during his minority. The want of parties able to contract with each other, removes, in either case, the foundation of an action at common law. It, therefore, appears to me, that the court below erred in charging the jury, that if the ward had laboured for the guardian, and been faithful, he might, on his arriving at age, treat his guardian as a stranger, and submit his case in this form of action to the Court of Common Pleas. We do not, however, mean to say, that a ward cannot, under any circumstances, or in any mode, recover from his guardian a proper compensation for services or labour performed during his minority. There may be cases, (such as a guardian hiring out his ward to others, and receiving the price of his labour, or of charging the ward for his boarding and clothes, whilst he was living with, and labouring for him,) in which, the ward ought to be paid; but, such cases properly belong to the decisions of the Orphans' Courts, when legally brought before them. The guardian, when the ward comes of age, is bound to give an account of all his transactions, on behalf of his ward, and to answer for all losses occasioned by his wilful default or negligence. All we mean to say is, that the compensation, cannot be ascertained in an action, like the present, in the Court of Common Pleas. In this case the guardian has not settled any account of the ward's estate, in the Orphans' Court of the proper county. He can be cited so to do; it is not too late. That court is, in our opinion, the appropriate tribunal to settle the accounts of guardians and wards. It has the care and control of the subject-matter, and is clothed with ample powers to enable it to do full and complete justice to the parties.

The first error assigned has been abandoned, or rather, it appears to us, that no such exception, as stated, was taken in the court below. But, the judgment of the Court of Common Pleas must be reversed for the reasons above-mentioned.

TOD, J.—It obliges me to have a great doubt of the soundness of any opinion of mine, to find it opposed by the opinion of all the rest of the court. I disagree on one or two points. An infant, a party to a contract, is not bound by it unless he chooses to be bound. The other party has not the same election.

"An infant may sue on a contract of marriage with a person of full age, though the infant cannot be sued."

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“So, he shall maintain covenant, *assumpsit*, &c., though he himself is not bound. *A fortiori*, where the money or consideration on the part of the infant is paid; and the consideration executed.

“A lessee can in no case, avoid the lease on account of the infancy of the lessor.”

These extracts, containing matters which may be found in every book on the subject, are perhaps not wanted to show, that as far as respects the question of infancy, the contract established by the jury in this case, is binding upon *Denison* at any rate: for, without any precedent, the rules of fair dealing, and of common sense, would probably teach us, that a man of full age, dealing with an infant, after getting all that he is to get by the agreement, shall not be suffered to withhold the equivalent, by setting up the plea of infancy against the infant himself.

Then, was the contract valid in other respects? Being made by the mother is no objection. “He who is to have the benefit of the promise may bring the action. Upon a promise to B. to pay twenty pounds to an infant at his full age, and to educate him in the mean time, the infant shall have the action.” 1 *Com. Dig.* 206. *Felton v. Dickenson*, (10 *Mass. Rep.* 287,) was a case like this in many respects. It was *indebitatus assumpsit*, for work and labour by the plaintiff while a minor: it was a contract, not made by the infant himself, but by his father for him: it was an alternative promise of money or land on the infant’s coming of age: and it was general *indebitatus assumpsit*, on a special contract, and the plaintiff recovered.

So far, I am very glad to be able to say, we all seem to be agreed. The whole difficulty, or at any rate, the whole difference of opinion on the bench, arises from the characters of the guardian and ward heretofore sustained by the parties. I think there is nothing in that matter to bar this action. There is no evidence, that the contract with the mother had any connexion at all with the guardianship, nor that *Denison* ever did a single act as guardian of the boy to the hour of the trial, or filed an account, or offered to file one, or ever accepted the guardianship directly or indirectly. The evidence would strongly imply, that the alleged guardianship did not exist until after the contract. Now, I do hold it to be not according to the benignity of the law, that infancy shall be suffered to be the instrument of mischief to itself, or that the infant here should, by one imprudent and most unnecessary act, be made to forfeit his stipulated wages for nine years of labour. And if *Mr. Denison* was consenting at the time, and accepted the guardianship, I do not know that it would mend his case; for, as the boy lived with him at the time, the presumption of law, and of fact too, would be irresistible, that the whole business of guardianship was the suggestion and act of *Mr. Denison* himself. But I will not rely upon any of these matters. I will concede the appointment of guardian to

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be legal and proper; yet still, in my opinion, this action can be sustained.

It is supposed that the plaintiff might possibly recover on any other contract with his guardian, yet he cannot recover in a demand of wages for labour, because, if the services were rendered, he, the guardian, as such, was entitled to them without any bargain, and without any compensation. All which I must deny, for, in my opinion, the law gives to a guardian no right to any services whatever from the ward. And if the law did give such right, the guardian would, I think, be competent to waive the provisions of the law, and agree upon terms for himself by a special contract. In *Wilson v. Church*, where the plaintiff was a public pauper, assigned and bound to work towards his own support, and had made an agreement with the assignee, the employer, to get special wages to himself for special services, and had sued for the wages, and it was objected that the defendant was entitled to all the services without any bargain, yet the court said it was too late for the defendant to talk of his legal rights after his own contract, and gave judgment for the plaintiff. (1 *Pick.* 23.) But in the present case, it seems to me, that the guardian had not the least pretence of legal right to the services of the ward. As to standing in *loco parentis*, the guardian was not so for any purpose applicable to this suit. A father is bound by the law in all cases to support his infant child in sickness and in health: while the guardian is bound to nothing of the kind. This I take to be a good reason why the father is entitled to services and the guardian not entitled to them. Lastly, if the plaintiff is entitled to redress, must he go into the Orphans' Court for it? I think not. The argument of the counsel of the defendant in error proves very clearly to my mind, that the Orphans' Court has no more jurisdiction of the matter than it would have in case a female ward should demand damages of her former guardian for breach of a contract of marriage, or in case a ward should sue his guardian for any personal injury, or bring ejectment for land seized during the guardianship and not restored. Here the objection is not made until after a trial at law upon the merits. But if it had been made at first, it ought not, in my opinion, to prevail. It could never be looked for, that a supposed wrong-doer would fairly put down against himself a full account of his own breach of faith. And it would seem to be as contrary to all the rules of justice as it is to practice and experience, to permit a defendant, by setting up a jurisdiction in the Orphans' Court, not only to evade a jury trial, but to make himself a witness in his own case on a question of damages. So that my opinion is, the court below was substantially right, and their judgment should be affirmed.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 24, 1828.]

CHRISTMAN and others *against* The COMMONWEALTH,
for the use of YEAGER'S Administrators.

IN ERROR.

The person who first sues on an official bond of a sheriff, is entitled to have his judgment first paid.

ERROR to the Court of Common Pleas of *Columbia* county.

The sheriff of the county being in arrear and delinquent in his office, sundry suits at the instance of different persons, were brought against him and his sureties upon the official bond, and judgments obtained thereon. The whole balance of the penalty of the bond being paid into court by the sureties, or some of them, the money was found to be insufficient to satisfy all the judgments. In this case, upon demurrer in law, the question presented was, whether he who first brought suit on the official bond, or he who sued last, but obtained judgment first, was entitled to priority of payment. The court below, by their decision, gave the preference to the judgment first entered, without regard to the time of commencing the suit.

The opinion of the court was delivered by

Ton, J.—The act of assembly, (*Purd. Dig.* 753, 4 *Sm. L.* 45,) which directs the mode in which sheriffs and coroners are to give security, &c., explicit as it appears to be, is silent on the very important question here presented. Therefore, we must decide on principle, and on authority as far as authority goes. In *Dallas v. Chaloner's Executors*, (3 *Dall.* 501, *in note*,) M'KEAN, C. J., declared it to be an established principle, *that the person who first sues and obtains judgment on an official bond, is entitled to take the whole of the penalty, if his demand amounts to so much, in exclusion of every other claimant.* And in *Dallas v. Hazelhurst*, (4 *Dall.* 106, *in note*,) the amount of the penalty of the official bond was paid into court, as in this case: and a motion was made in behalf of the claimants who had sued last, or who had not sued at all. Against them it was urged, *that upon principle and authority, the creditor first suing was entitled to be first and completely paid:* and the court were clearly of that opinion, and directed the whole of her debt and interest to Mrs. Gapper, because she had commenced her action first. Those questions arose not upon sheriffs', but upon auctioneers' bonds: but the decisions apply. Inconveniences have been suggested, if the mere contrivance of bringing a suit, and there stopping, can be allowed to repel or delay, every other claimant. Now, we by no means say, that subsequent plaintiffs are to be in the least impeded in their pro-

(*Christman and others v. The Commonwealth, for the use of Yeager's Administrators.*

ceedings to judgment and execution. But the fund must be appropriated according to law; and as in other similar cases of dispute, the money may be brought into court. Any case of fraudulent delay of a prior suit, any case of wilful delay, even without fraud, must be decided when it arises. By the act of assembly, the recognisance entered into by the sheriff and his sureties, binds as a judgment. Our decision is with reference to the fund thus set apart by the law. Some inconveniences may happen, but it seems to me they will bear no proportion to the mischiefs which must follow the right of an insolvent sheriff, or of his sureties, to select their favourite claims, and appropriate the fund in their own way to whomsoever they may think fit to prefer, and in fact, almost dispose of the whole penalty of the bond as if it was their own property. If there is to be any fraud in the case, clear it is, that a fraudulent commencement of a first suit is not by any means so likely to happen, as a fraudulent confession of judgment in the last. A course of embezzlement, or negligence by a sheriff, injurious to suitors, to an amount beyond the penalty of his official bond, must usually be quite a long course. Early notice of his deficiencies may in many respects, and to many persons, be very material. Then, as far as respects the fund created by the official bond and recognisance, by deciding, that he who is first in time is first in right, and that indulgence and concealment granted to the officer, shall not be encouraged and repaid by a most injurious preference at the expense of other suitors, we adhere to the old decisions, and we preserve some check against the very first wrong or careless step of every sheriff, and lessen the probabilities of ultimate loss to the sureties as well as to others.

Judgment of the court below reversed, and judgment entered for the plaintiff in error.

[SUNBURY, JULY 3, 1828.]

HEPBURN *against* M'DOWELL and another.

APPEAL.

A permission to another to erect a dam for a temporary purpose, is terminated by the decay of the dam, and will not authorize the erection of another dam in its place.

One who sees another erecting a dam, by which the water will be flowed back to his injury, is not bound to give him notice, if the latter is acquainted with his rights, or has the means of becoming so, and obstinately proceeds in the assertion of them.

Where notice is necessary, it is sufficient if the party employs efforts to give notice, and succeeds in doing so to the contractor for the defendant, though it does not appear the notice was actually conveyed to the defendant.

APPEAL from the Circuit Court of *Columbia* county.

The opinion of the court was delivered by

ROGERS, J.—In awarding a new trial, the court think proper to lay down some principles which may be useful in another trial of the cause. It appeared in evidence, that *Frederick Ritter*, under whom the plaintiff claims, was in possession of the *Jew's Mill*, from 1811 till 1815. The spring he came there was no dam, but in the summer of that year, *Drake*, under whom the defendants claim, drove, and put in some stakes and bushes, and made a dam, as the witness says, like a fish-dam. It was swept away in a short time by a fresh. *Drake* then asked *Ritter* if he would help him to make a little dam, with which *Ritter* complied, by assisting him to get logs, and to lay them across the creek, to cut bushes, and to lay them on the logs, and that then *Drake* hauled stone on the top of the bushes. *Ritter* cannot say that the dam was ever finished, but believes that it stood that winter, but was gone the next. He says he did not take particular notice how high it came, for he did not care much about it, as it did not injure him, and that he never gave *Drake* any right to overflow the ford. He was sure the dam he made would not stand long. That he gave *Drake* no grant of the right, and that there was a saw mill on the property at the time. This permission, or license, has been attempted to be magnified into a grant of a right to erect a dam of a permanent nature for a grist mill, of the same height, which it is alleged was twenty inches. As a license for the erection of the present dam, the assistance, or permission of *Drake*, as disclosed by the evidence, is entitled to no weight. It was a license for a temporary purpose, (which appears to have been answered,) which would have excused *Drake* from a suit by *Ritter*, but does not amount to a grant for any other purpose than was in the immediate contemplation of the parties. It is manifest it was neighbourly kindness on the part of *Ritter*, without the slightest view of granting a right to a permanent use of the

(Hepburn v. McDowell and another.)

water. To make the most of it, it was a license during the continuance of the dam, and as soon as the dam was swept away, the license ceased to exist. To justify a new erection, even for a temporary purpose, a new grant, or permission was necessary. I mean, if the effect was, to swell the water on the land of *Ritter*. In *Rerrick v. Kerr*, the distinction is taken between the cases, where the object to be accomplished is temporary, and where it is permanent.

Permission to use water for a mill, or any thing else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation. But it is otherwise where the object to be accomplished is temporary. And, the court then instance a saw mill as a temporary erection. 14 *Serg. & Rawle*. No person can avoid seeing, that it was not within the comprehension of either of the parties, that *Ritter* had made a grant to *Drake* of a right to a permanent use of the water. It was a temporary use that was intended to be conferred, and for a particular purpose, and it would be the height of injustice to extend that to any other purpose than that intended by them.

On the trial, it was contended, first, that *James Hepburn* was bound to give *McDowell* notice, and that the notice which was given was insufficient. If *McDowell* stood in the situation of a man totally uninformed and ignorant of his rights, it would be the duty of *Hepburn* to put him on his guard. He, however, was acquainted, or ought to have been with his own and his neighbour's lines, and was well aware, or ought to have been with the effect of the dam. He at least was as well acquainted with those matters as *Hepburn* could be. He acts then at his own peril, and if under such circumstances he swells on his neighbour, he must answer for the consequences. Notice is required to a man who acts *bona fide*, not to him who wilfully and obstinately persists in using that to which he has no title, or pretence of title, without giving or offering compensation for its use. It may be asked, why give *McDowell* notice? Was he ignorant of his own or his neighbour's lines, or the effect which his dam would produce? That is not pretended; or, if he was ignorant, it was because he would not take ordinary pains to inform himself. It was his duty to obtain the necessary information, and as a just man, he should have obtained the permission of *Hepburn* to swell the water beyond his lines. It is in the opinion of the court, no answer to say, that *Fishing Creek* was a public highway, and that the injury done to *Hepburn* was trifling; and to apply the maxim, *de minimis non curat lex*. He has swelled, for his own purpose, and to his great advantage, on the soil of his neighbour; and there is that special damage which the law contemplates. It, in its consequences, lessens the value of *Hepburn's* mill, and without determining the point, it may be matter well worthy of inquiry, whether the measure of damages be not the benefit derived from the erection to *McDowell*, rather

(Hepburn v. M'Dowell and another.)

than the special damages of the plaintiff. Although *Fishing Creek* be a public highway, it is an easement merely; the right of soil remains in the owners of the adjoining property.

But, even if notice was necessary, (and it would be strange if a man was bound to give another notice not to violate the law,) the plaintiff has done all that was required. *Hepburn* gave a power of attorney to *Hopkins* for the special purpose. *Hopkins* informs us he went three times, and could not find them. He then went to *Andrew Shreiner*, who was *M'Dowell's* contractor, and gave him notice not to build the dam. *Shreiner* said, he cared nothing about it, that *M'Dowell* and *Milland* were bound to indemnify him, and he would go on, and put up the dam. If notice be necessary to persons who are engaged in a work with a full knowledge, or who may have knowledge that it will prove a nuisance, notice to one is notice to all. They are engaged in a joint act, the consequences are visited on all, they are affected by the acts of all; and even if *Shreiner* should have omitted to inform *M'Dowell* and *Milland*, (which is highly improbable,) it would make no difference. *Hepburn*, by his attorney, has done all the law requires, and shall not be answerable for the omissions of *M'Dowell's* and *Milland's* contractor.

New trial awarded.

[SUNBURY, JUNE 17, 1828.]

CALVIN *against* M'CLURE.

IN ERROR.

The jury may certify a sum due to the defendant where there is a plea of payment, though it does not appear there was any notice of special matter, or plea of set-off.

WRIT of error to *Columbia* county. The plaintiff declared in assumpsit for money had and received, and the defendant pleaded *non assumpsit* and payment; whereupon the jury found for the defendant, and certified under the act of assembly that the plaintiff was overpaid to the value of eight dollars. Notice of set-off had not been given: and the error assigned here was that the jury could not so certify but on set-off pleaded; or defalcation given in evidence under the plea of payment with notice.

Greer, for the plaintiff.

Bellas, for the defendant.

The opinion of the court was delivered by

GIBSON, C. J.—Our act of assembly so far differs from the *English* statute as not to require the set-off to be pleaded in any case.

(Calvin v. M'Clure.)

"If two or more dealing together, be indebted to each other, it shall be lawful for the defendant to plead *payment*," (such is the language of the act,) "and give any bond, bill, receipt, account, or bargain, in evidence," and, "if it shall appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear." Thus, the plea of payment will authorize the finding of a sum due to the defendant whenever the evidence will; for such is the provision of the act of assembly. But, is there not danger of surprise from its generality? There undoubtedly would be, did not the courts, in most instances, guard against it, by rules requiring notice of special matter, without which, nothing but direct evidence of actual payment is admissible. But the admissibility of evidence under the plea, and the power of the jury over the subject matter of the evidence after it has been admitted, depend on different considerations. The court has power to regulate the evidence, but not to control the jury in determining on the application or effect of it; or to narrow powers derived not from the court but the legislature. Here there either was no rule to forbid the evidence of set-off, or it was not enforced; and in either alternative, the jury having become possessed of the whole case, were entitled to exhaust all their power in respect of it.

I am aware that a contrary opinion was intimated by Chief Justice TILGHMAN in *Anderson's Executors v. Long*, (10 *Serg. & Rawle*, 62.) But *King's Administrators v. Diehl*, (9 *Serg. & Rawle*, 409,) on which he seems to have relied, does not bear the position out, the decision there being as to the admissibility of the evidence, and not its effect on the jury; and I am enabled to say that the opinion now expressed was adopted by that excellent judge shortly before his death.

Judgment affirmed.

[SUNBURY, JULY 3, 1828.]

BOONE *against* BOONE.

IN ERROR.

Where the plaintiff appeals from the judgment of a justice, the defendant may obtain a judgment in court for a sum exceeding one hundred dollars.

THIS was a writ of error to the Court of Common Pleas of *Columbia* county. The action was brought before a justice of the peace from whose judgment the plaintiff appealed; and there was an award of one hundred and fifteen dollars in favour of the defendant, from which neither party appealed. It was argued here that

(Boone v. Boone.)

the jurisdiction of the appellate court is necessarily the same as that of the inferior; and, consequently, that there could be no judgment in favour of either party for more than one hundred dollars.

Bancroft and Marr, for the plaintiff in error.

Grier, for the defendant.

The opinion of the court was delivered by

GIBSON, C. J.—Repeated decisions have established, that a new cause of action cannot be prosecuted on the appeal; and that it ought not to appear by the writ, that the party who had recourse to the justice, prosecuted a cause of action not within his jurisdiction. A set-off is undoubtedly in the nature of an action: but here the party who recovered by the award, did not become an actor till the cause came into the Court of Common Pleas; and as the jurisdiction of the justice was not sought by him, I can see no reason to prevent him from recovering his whole demand. He was carried before a tribunal which, by reason of the limited extent of its jurisdiction, was incompetent to act on the subject of his defence; and for that reason, he, instead of the plaintiff, might have been compelled to resort to an appellate tribunal; and, in that case, to restrict the Court of Common Pleas to the jurisdiction of the justice, would obviously frustrate the very intent and object of the appeal. Here the plaintiff was the appellant: and, as the defendant could not use his set-off before the justice, he must have succeeded by using some other defence; perhaps the plaintiff's evidence was discredited: but there can be no reason for putting a party who has two sufficient grounds of defence in a worse condition in the appellate court, than he who has but one. The question, therefore, is to be viewed as if the defendant were the appellant. But, if the analogy between an action and a set-off were carried out entire, it would produce no difference in the conclusion; unless it were admitted that a *part* of a debt sufficient to extinguish the plaintiff's demand, might be set off before the justice, where the whole could not. Even if that were so, it would not be worth while, for the sake of an analogy, to stop short of complete justice, or drive the defendant to a separate remedy, when it is obviously better for both parties to have all the points in contest settled at once. Simply to prevent the plaintiff from unjustly taking money out of the defendant's pocket in the first instance, is less than justice: he ought to be prevented also from inflicting on the defendant the delay and vexation of another suit. But the inconvenience there would be in inquiring in an action for the residue of the set-off, how much had already been allowed where some of the jurors or arbitrators may have agreed to sustain the defence on one ground and some on another, is also worthy of consideration. Where the demand of the plaintiff should be unliquidated, or the defence of a mixed nature, much uncertainty would necessarily arise, and there would be danger of having the set-off allowed

(Boone v. Boone.

twice, or not at all; but danger from this source would be excluded by settling the whole on the appeal. There is not the semblance of hardship in doing this and adjudging the costs to be paid by the plaintiff, whose unnecessary interference, in the first instance, was the efficient cause of their being incurred.

Judgment affirmed.

[SUNBURY, JULY 3, 1828.]

ROAD from APP'S Tavern to SUSQUEHANNA through CHARLESTOWN.

CERTIORARI.

Viewers who lay out a road, if required by act of assembly to be freeholders, must be taken to have been so, unless the contrary appears.

It is a sufficient adjudication that the road is a public one, if the viewers say they lay out the road for public use.

If the draft shows that the road passes through the lot of an individual, it need not state the precise distance it passes through it.

No notice need be given to the owners of land of the time when the viewers will meet to lay out a road passing through it, but the viewers ought, in passing through improved ground, to call the person living on the farm.

THE opinion of the court was delivered by

HUSTON, J.—A view was regularly appointed, which returned a report and draft of a road for public use.

At the return, an application was made to the Court of Quarter Sessions of *Union* county, in which the road was situated. Exceptions to this report were filed, as is stated in the return, and affidavits filed on both sides: the matter was pending during three or four sessions, and at length the report was set aside, and this is a *certiorari* to reverse that decision. What reasons were filed below does not perhaps appear with certainty, but we have five objections to it here, which we may safely consider as embracing those formerly taken. They are as follows:—

1. The act of assembly requires that the viewers should be freeholders, whereas some of the viewers were not freeholders. Although several depositions were taken below, none of them apply to this point. Now we must take it they were qualified persons, unless there is some colour of evidence that they were not, or some admission of the fact.

“The act of assembly requires that the viewers should particularly state, whether they judge the same necessary for a public or private road.” The report does not state any adjudication or necessity, but merely states that they have laid the “following road for public use.” Nothing but a determination to give as much op-

(Road from App's Tavern to Susquehanna through Charlestown.)

position to this road as possible could have suggested this objection. The viewers are, nay, generally, must be plain farmers. It never could be supposed mere technical formality was required from such men. The report must state distinctly whether they decide on a public or private road: if that appears plainly in their report, it is sufficient; no one can mistake this report.

3. The road, as laid out, runs through a valuable lot of *John Snyder*, and the report or the draft did not show how far it passes through the same, nor does the report mention this property.

This exception is contrary to the fact, unless the objector meant to shelter himself under the words "how far;" the draft does show that the road passed through *John Snyder's* lot. It is not necessary that the precise distance through the land of an individual should appear, nor that it should appear in the report and draft both, it is sufficient if it appear in either.

4. The report is signed by four viewers only, and the report does not state that five viewed the ground.

This is another mistake. The report does state the five viewed, and names the viewer who was on the ground, but who did not sign.

5. No previous notice was given to *John Snyder* of the time when the viewers were to meet.

Nor was any previous notice necessary: he was on the ground present with the viewers and heard by them, and offered to withdraw all objection, if some person would buy his lot.

It is, to be sure, desirable that a person should be present when viewers are laying out a road through his land, but no law requires notice to be given to the owner of the lands, and in many of the counties no notice could be given; for roads are often laid out through unimproved land, the owner of which resides at a distance or is unknown. There is no person whose duty it is to give notice; if the road goes through an improved farm, the viewers as they proceed, always call the person living on the farm, and ought to do so, and this is all that is necessary: here, this person objecting was present, and that is enough.

The order of the court setting aside this report, is reversed, and the record sent back, that the Court of Quarter sessions may proceed to make the necessary orders confirming the road and ordering it to be opened.

[SUNBURY, JUNE 24, 1828.]

GASKINS *against* GASKINS and others.

IN ERROR.

Interest is recoverable only from the time of demand or suit brought after eleven years by the widow against her son, for a legacy of an annual sum charged on land, equal to about one third of the rent, there being no evidence of any agreement or of the conduct of the children towards her.

WRIT of error to the Court of Common Pleas of *Northumberland* county.

The opinion of the court was delivered by

HUSTON, J.—*Thomas Gaskins*, by his will dated the 2nd of *February*, 1813, devised to his widow, the plaintiff, fifty dollars per annum during her life, and charged it on his plantation, which he devised to the defendants, his sons, who entered and have been in possession. The value of the lands was perhaps such, that fifty dollars per annum would almost be equal to one third of the rent in common years at the time of the testator's death. About eleven years after the death of the testator, this suit was brought, and the only question for this court, arises on an exception to the opinion of the court below, who directed the jury, "That the plaintiff can recover interest only from the time of the suit brought, there being no evidence of any previous demand." The case is brought before us in an exceedingly meagre form. The evidence on which the court delivered this charge is not set out, except the will: and it is also stated, that the sons had made partition among themselves; but whether so as that each son got an equal share of the land, or of that part which was improved, we do not know from the record. Where the plaintiff lived since the death of the testator, we do not see by any thing before us; we know that two of the defendants did not resist her claim, but after the jury was sworn, agreed to a verdict, so far as respects them; but why they did not at once confess judgment when suit was brought, or why they did not pay her annually as the annuity or charge fell due, we know not, nor why she, if she really received nothing, delayed to bring suit for above ten years. In discussing the cause, something *out of the record* was said on each side, and no agreement between the counsel. We know that in almost every trial in the lower court, certain matters are stated in opening the cause, and in opening the defence, which are not proved because not denied, and often because known to every person in the neighbourhood, and to part, at least, of the jury, and to the court and counsel. None of this is in general, on the record sent to this court. Hence, it often happens, that we decide what is the law on a statement of facts very variant from that presented by the court below.

(Gaskins v. Gaskins and others.)

It is scarcely possible that a widow of a common farmer, to whom a rent charge of his estate is devised for her support, should live a dozen years without receiving any part of it, unless she lived with her children, to whom the estate was devised, and from whom she was to receive a yearly sum; and such a case would present a very different aspect from one in which she had been driven away from her children to support herself by her own labour among strangers. And though it does not appear on our record, it is inconceivable that it was not perfectly well known and agreed to at the trial whether she lived with her children on the land or supported herself among those unconnected with her; in which latter case, harshness, &c., might, under circumstances, call for a decision different from what would be right in the former.

The case before us presents the naked question of the plaintiff not asking for principal or interest until the interest on the first years became equal to two thirds of the principal; and we have on authority and on principle come to the conclusion, that the decision of the court below was right. In *England*, in many of the states, and in this state, until within a few years, interest was not, in ordinary cases, recoverable on rent. In *Bantleon v. Smith*, 2 Binn. 146, it was decided, that the owner of a rent charge in fee, when he resorted to the land, could not recover interest; here the suit is against the defendants, as terre-tenants, to bind the land. In that case, the question as to interest between landlord and tenant, in covenant or debt for rent, (but not if distrained for,) was left open expressly. In *Obemeyer v. Nichols*, 6 Binn. 159, it came before the court, and the decision is, that in ordinary cases, interest is recoverable on a rent certain, payable at a fixed time, from the day of payment; but, that where a landlord has acted unfairly or unreasonably towards the tenant, it ought to be left to the jury, who, in many cases, may be justified in refusing interest. It has been considered in this country, more than any other, that interest should always follow and accompany a debt; that to keep the money was an advantage to the one and loss to the other, equal to the interest. This may be true as between men in certain situations, but is far from being universally true: it is often absolute ruin to one party, who never suspected it until it is demanded. Where an annuity is growing from land, of a yearly value sufficient to pay it, and nothing said of it by him to whom it was due, the fair presumption is, he did not want it. There is no ground to suppose the occupiers of this land agreed to pay or expected to be charged interest for it; and the decision is, that if the land is resorted to, interest is not due until demanded or suit brought. Here, then, we are stopped by authority, and we do not feel disposed to overrule that case. The claim was to have judgment *de terris*, and the judgment is so.

Judgment affirmed.

[SUNBURY, JUNE 17, 1828.]

BEALE'S Executors *against* The COMMONWEALTH, for
PATTERSON.

IN ERROR.

The administrator and his sureties are not liable on the administration bond for the proceeds of real estate of the intestate sold by order of the Orphans' Court.

ERROR to the Court of Common Pleas of *Mifflin* county.

The opinion of the court was delivered by

ROGERS, J.—The material point is the exception to the charge, "That real and personal estate are assets in *Pennsylvania*, and that the administrator in this state is liable on the administration bond, for the proceeds of the real estate sold by order of the Orphans' Court, as fully as he is for the proceeds of the personal estate of the deceased." If the administrator be liable on the bond, it follows the sureties are liable also; and, I do not understand this to be the construction given in practice to the act of 1794. In taking the security, reference is had to the value of the goods and chattels, which, properly, form the inventory, of which the real estate constitutes no part. The bond is usually taken in double that amount as near as it can be ascertained, and no surety has considered himself answerable for the value of the land, and it would, in most cases, be a most insufficient security for that purpose.

The bond required by the act justifies this construction, the condition of which is, that the administrator make a true and perfect inventory of the goods, chattels, and credits of the deceased, and which have or shall come to his possession or knowledge, and all other the goods, chattels, and credits, of the said deceased, &c., which shall, at any time after, come into his hands or possession. In this the legislature evidently refers to such goods and chattels as form the inventory, for which and for which alone, the sureties are answerable. Nor is it necessary for the interest of the estate to go further, as it is not certainly known that the real estate will be wanted for the payment of debts; for although lands are assets in the hands of the administrator, it is *sub modo* only. The 19th section of the act of 1794, prescribes the manner of the sale for the payment of debts and maintenance of minor children; and the third section of the 26th of *March*, 1818, gives authority to the Orphans' Court, to require and take sufficient security from the administrators, conditioned for the faithful execution of the power committed to him in making such sale, and truly to account for and pay over the proceeds thereof in such manner as the said court shall legally decree. A faithful execution of the power conferred

(Beale's Executors v. The Commonwealth, for Patterson.)

by this act will give every security required, without subjecting the sureties on the administration bond.

Judgment reversed, and a *venire facias de novo* awarded.

[SUNBURY, JUNE 24, 1828.]

GREEN and others against WATROUS.

IN ERROR.

In ejectment for land sold by execution, the plaintiff may recover against all who were defendants in the original judgment, or held under them, without showing other title.

A plaintiff is not estopped from recovering in ejectment under a title to the defendant's land by sale on a *levari facias* issued on a judgment in a *scire facias* on a mortgage, notwithstanding he has, since obtaining such title, levied upon and sold the land to a third person by execution on another judgment, if at the time of the condemnation and sale under the latter execution, he gave notice of his prior title, and that the sheriff only sold the defendant's claim, whatever it might be, and the plaintiff had brought his ejectment previously.

A verdict for the plaintiff for a four hundred and twelve acre tract, deducting one hundred acres described in an agreement specified in the verdict, is sufficiently certain.

WRIT of error to the Court of Common Pleas of *Susquehanna* county.

At the term of *May*, A. D. 1826, *Joseph Watrous*, the plaintiff below and defendant in error, brought this ejectment in the court below against *Obadiah Green* and *Zalmon Gregory*, two of the plaintiffs in error and defendants below, and declared for "a certain tract of land, situate in the township of *Bridgewater*, in *Susquehanna* county, containing four hundred and twelve acres and eighty perches, or thereabouts, adjoining lands now in the possession of *Isaac Hubbard*, &c., the right of possession, or title to which, the said *Joseph Watrous* saith is in him, and not in the said *Obadiah* and *Zalmon*," &c.

And *David Green*, the other defendant below, and plaintiff in error, at the *December* term, applied by affidavit, and the court ordered that he should be admitted to defend the possession of the premises described in the declaration, as a co-defendant with the said *Obadiah Green* and *Zalmon Gregory*.

On the trial, the plaintiff offered in evidence the record of a judgment for one thousand eight hundred and eighty-one dollars, besides costs of suit, rendered by the said court in favour of *John B. Wallace*, to the use of *Thomas B. Overton*, against the said *Obadiah Green*, entered on the records of said court as No. 39, *August* term, 1818, on a writ of *scire facias sur mortgage*, in which suit

(Green and others v. Watrous.)

one *Charles Catlin* was the plaintiff's attorney: to which evidence the defendants objected, but the court overruled the objection, and admitted the same to be read, and the defendants excepted.

The plaintiff further gave in evidence an *alias levari facias*, issued from the said court, on the said judgment on the 28th day of *December*, 1818, returnable to *February* term, with a return made thereto by *Samuel Gregory*, sheriff of said county: by which return it appeared, that the said sheriff, by virtue of that writ, had sold the premises therein described to the said *Charles Catlin*, the attorney of the said plaintiff, for the consideration of eight hundred and ten dollars. A deed, dated *May* 1st, 1820, from the said sheriff to the said *Charles Catlin*, made in pursuance of the said sale: a deed, dated *August* 2d, 1824, from the said *Charles Catlin* to the said plaintiff and one *David Francis*, for the premises in controversy. Also, an assignment, dated *June* 30th, 1821, on the back of the said sheriff's deed, by the said *Charles Catlin* to one *Thomas Overton*, of all his interest in the premises therein described, for a valuable consideration. A deed, dated *May* 6th, 1824, from *Thomas Overton* to the said plaintiff and *David Francis*: and, a deed, dated *February* 4th, 1826, from the said *David Francis* to the said *Joseph Watrous*, of all his interest in the lands in controversy.

The plaintiff then gave in evidence the return of *Samuel Gregory*, sheriff of said county, to the summons issued in this case in favour of the plaintiff, against the said *Obadiah Green* and *Zalmon Gregory*, and the above-mentioned affidavit of *David Green*, wherein he deposed, that the said *Zalmon Gregory* occupied the premises as his tenant; and, a mortgage, dated *March* 22d, 1810, of the premises in controversy, from the said *Obadiah Green* to the said *John B. Wallace*, on which the above-mentioned writ of *scire facias* was issued.

The plaintiff then called *Jonah Brewster* as a witness, who testified as follows, to wit:—About three years ago, *David Green* told me his father, *Obadiah Green*, had told him he might have one hundred acres off the south-east corner of the tract, and make the most of it, and if there was any thing to pay for it he must pay it: that he had a mind to take out a warrant for it, and that he could then hold it. *Gregory* lived a few months on *David's* one hundred acres—he has moved off the land. *David Green* lives there: lately I have heard him say, he claimed under a sheriff's deed: he was there in 1820: he commenced on the one hundred acres long after 1811.

The defendants gave in evidence a record of a judgment in the said court, entered as No. 67, of *September* term, 1822, in favour of one *Isaac Goodsell*, against the said *Obadiah Green* and *John Darrow*, on a transcript, filed *June* 11th, 1822; an assignment of the said judgment to the said *Joseph Watrous*, filed *April* 29th, 1824; a writ of *fieri facias* issued thereon *March* 9th, 1824; a levy,

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by virtue thereof, on the premises in controversy, as the estate of *Obadiah Green*, and an inquisition and condemnation of the said lands; also, the record of a judgment entered as No. 68, of *September* term, 1822, in favour of the said *Isaac Goodsell* against the said *Obadiah Green* and *John Darrow*, also assigned to the said *Joseph Watrous*, on which judgment the same proceedings were had with the last-mentioned judgment, and the record of another judgment of said court, entered as No. 11, of *May* term, 1824, in favour of the said *Isaac Goodsell* against the said *Obadiah Green*; a writ of *fieri facias* issued thereon *April* 9th, 1824, &c., and an assignment of the said judgment, from the said *Isaac Goodsell* to the said *Joseph Watrous*, dated *February*, 28th, 1824, filed *April* 29th, 1824; a *venditioni exponas* issued thereon, to which the sheriff returned at *September* term, 1826, that he had sold the land, it being the premises in controversy, to *David Green* for the sum of five hundred dollars; also, writs of *venditioni exponas* on the said two judgments above-mentioned as No. 67 and 68, of *September* term, 1822, and receipts of *William Jessup*, Esq. the attorney of the said *Joseph Watrous*, for the amount of the debt, interest, and costs of the said three several judgments, together with the receipt of the said *Obadiah Green* for the residue of the purchase money; a deed from *Samuel Gregory*, sheriff of said county, to the said *David Green*, dated *September* 4th, 1826, for the premises in controversy, made in pursuance of the last mentioned sale.

The defendants then called *Philander Stephens*, Esq., the late sheriff of said county, who testified, that the said *Joseph Watrous*, or his attorney, placed the said writs of *fieri facias* in his hands; that the said *Joseph Watrous* was present when the inquisition was held on said lands—that he did not direct him not to proceed—that it must have been by instructions of the said *Joseph Watrous*, or his attorney, that he levied on this land. That he should suppose from his intercourse with the plaintiff, that he must have known that he, the said sheriff, levied his execution on the land as the property of the said *Obadiah Green*.

Also, *Samuel Gregory*, the present sheriff of said county, who deposed as follows, to wit:—I don't know who placed the execution in my hands, whether Mr. *Jessup* or the prothonotary—*Watrous* spoke to me about the sale—asked when it would take place: after the sale, he said he wanted his money, if he was going to have it. I paid the money to Mr. *Jessup*. *Watrous* bid on the land nearly as high as *David Green*. On his cross-examination, he testified, that *Joseph Watrous*, at the time of the sale, gave notice to all that were present, that he claimed the title to the land, and that he only sold the possession, or right and title of *Obadiah Green*, and that he had an ejectment pending for the title, and that he should go on with it. I gave notice at the time, that I only sold *Green's* interest in it.

And *Joshua W. Raynsford*, Esq. being also called as a witness

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for the defendants, testified, that three years ago last *April*, he was one of the inquest held on *Green's* place; he thought *Joseph Watrous* was present and had an interest in having the property condemned, and that *David Green* appeared on behalf of his father, not to have it condemned.

The said plaintiff then called *Joseph W. Gurnsey*, who testified, that he was present at the sheriff's sale when *David Green* purchased. *Joseph Watrous* gave notice, that he was sole owner of the land, and that it was *Obadiah Green's* right and title only which was to be sold, and that there was an ejectment pending—thinks it was the title of possession only he was selling—*David Green* was in the room when the notice was given. When we went out on the stoop *Watrous* repeated it again, and repeated it two or three times during the sale.

The plaintiff further gave in evidence an article of agreement, dated *September 2d*, 1818, between *Thomas B. Overton* and *Obadiah Green*, whereby the said *Thomas B. Overton* covenanted to sell and convey to the said *Obadiah Green* one hundred acres of land, parcel of the premises in controversy, at an appraisement, to be made by persons therein named, and on the conditions therein specified: a report of the said appraisers, dated *September 6th*, 1820, wherein they find the said land worth six hundred and twenty-five dollars, and deduct one hundred and seventy-five dollars for certain improvements, according to the conditions of the said article of agreement, leaving four hundred and fifty dollars to be paid by the said *Obadiah Green* to the said *Thomas B. Overton*, for the said one hundred acres of land.

The defendants called witnesses, who testified as follows, to wit: *Samuel Gregory*.—After the property was sold on *Overton's* execution, and at the time of the sale, *Catlin* said it was for *Overton* he purchased; afterwards, he called on me and said, he had dealings with *Overton*, and would take the deed in his own name, and I struck out *Overton's* name and inserted his in the return—*Catlin* was *Overton's* attorney.

Jonah Brewster.—After this contract, *Overton* instructed me, as his agent, to carry the contract into effect, and to bid off the land, and to exercise a sound discretion, and bid as high as fifteen or sixteen hundred dollars. When I was going to *Harrisburg*, I had a conversation with *Catlin*, and requested him to give information to Mr. *Overton*, as he was calculating to go to *Philadelphia*. *Catlin* said he was *Overton's* attorney, and could bid it off, and it would answer the same purpose as if I bade it off. *Overton* requested me to go on and run out the land and appraise it, and let *Green* have it when he was a mind to, if it did not injure the place too much.

Benjamin T. Case.—The deed from the sheriff to *Catlin* is in my hand writing. *Catlin* told me he bade off the property for *Overton*, but as *Overton* was owing him, he concluded to take the

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deed in his own name, and when he settled with him, would convey the land to him—that it was not intended to affect the agreement between *Green* and *Overton*.

The defendants then gave in evidence the petition of *Thomas Overton*, administrator of the estate of *Thomas B. Overton*, deceased, of *April* 13th, 1825, to the Orphans' Court of said county, for leave to sell the land in controversy, as the estate of the said *Thomas B. Overton*, with the record of the proceedings of the said court thereon.

The defendants prayed the court to charge the jury, and the court charged the said jury as follows:—

1. That the plaintiff has no right to recover, he having shown no original title, as *Zalmon Gregory* was in possession, without showing he held under *Green*.

“The court is of opinion, that the plaintiffs might recover against those he showed were defendants in the original judgment, or held under them, but not against *Zalmon Gregory*, unless he held under the defendants in that judgment.”

2. That the plaintiff cannot recover if he has shown title in himself, inasmuch as the lands were sold on his execution; he attending the inquest for condemnation, and causing the land to be sold with his privity and consent, and receipting the execution by his attorney.

The court say, “The principle is correct as stated, but if execution was levied on the interest the defendant or defendants had in the land by possession or contract, and notice given by the plaintiff at the day of sale, and also by the sheriff, that he did not sell the title which the plaintiff claimed, but only the defendant's interest, it would be otherwise.”

3. That an agreement was made between *Overton* and *Obadiah Green*, that *Green* was to have one hundred acres, if *Overton* bid off the property, upon such terms, as men appointed by them should decide; that as *Charles Catlin*, who made the purchase, was attorney for *Overton*, he took it as trustee, and those who claimed under him, held the land in trust, and subject to the agreement for one hundred acres.

“The court assent to the correctness of the principle, that *Catlin* purchased the land in trust, and from the records, all who claim under him must have had notice of the trust, and the plaintiff cannot recover the one hundred acres of land designated by the persons appointed under the agreement, because no deed has been made agreeably to the report of said men.”

The defendants excepted to the charge.

The jury gave their verdict for the plaintiff as follows:—“That they find for the plaintiff the whole amount of the four hundred and twelve acre tract of land, deducting the one hundred acres described in the original agreement made with *Thomas B. Overton* agreeably to the award of *Jonah Brewster*, *Benjamin T. Case*,

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and *George Cone*." And, thereupon, judgment was rendered for the plaintiff.

Errors assigned:—

1. The court erred in admitting the record of the judgment in the case of *John B. Wallace*, to the use of *Thomas B. Overton* against *Obadiah Green*, to be read in evidence to the jury without first showing, that *Zalmon Gregory* was in possession under the defendant in that judgment.

2. The court erred in their charge to the jury on the first point.

3. The court erred in their charge to the jury on the second point.

4. The verdict is uncertain.

The opinion of the court was delivered by

ROGERS, J.—For a particular statement of the facts, I refer generally to the bill of exceptions. The Court of Common Pleas charged the jury, that the plaintiff might recover against those he showed were defendants in the original judgment, or held under them, but not against *Zalmon Gregory*, unless he held under the defendant in that judgment. In this, we perceive no error. As between the purchaser and the defendants in the action, the purchaser can recover, on the strength of the sale and sheriff's deed, without showing other title, nor can the defendant show title in another. It was left as a fact to the jury, whether *Zalmon Gregory* held under the defendant in the original judgment; and if he did, the court say, the plaintiff might recover against him in the same manner as against the defendant in the original judgment; and it would be strange if he was placed in a better situation. The charge of the court is supposed to have reference to the facts proved in the cause, and we cannot perceive any thing in this direction calculated to mislead the jury; nor, when viewed in connexion with the facts, is the position assumed more broad than the law directs.

In answer to the question of the plaintiffs in error, that the plaintiff cannot recover if he has shown title in himself, inasmuch as the lands were sold on his execution, he attending the inquest for condemnation, and causing the land to be sold with his privy and consent, and receipting the execution by his attorney, the court say, "The principle is correct as stated, but if execution was levied on the interest the defendants had in the land by possession or contract, and notice given by the plaintiff at the day of sale, and also by the sheriff, that he did not sell the title which the plaintiff claimed, but only the defendant's interest, it would be otherwise." In this, the plaintiff in error has suffered no wrong. The parties to the original agreement entered into a contract, which appears not to have been carried into effect. *Joseph Watrous* brought his ejectment to the *May* term, 1826, for the whole four hundred and twelve acres and eighty perches, the right of possession, or title to

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which, he avers is in him, and not in *Obadiah* and *Zalmon*. The return of the sheriff shows the defendants to be in possession of the whole tract. They enter no disclaimer of part, but take defence for the whole, and it is under these circumstances that there is a levy and condemnation of the whole property, on the three judgments which *Joseph Watrous* had purchased against *Obadiah Green*. The levy and condemnation is in the ordinary mode. It does not speak of the interest of *Obadiah Green*, nor is that necessary. That is implied from the transaction itself, for it is only that interest which is levied on, condemned and sold. *Obadiah Green*, and those claiming under them, were in the actual possession of the land, and asserted their right to retain the possession by a general defence. The whole ground of the argument of the defendant's counsel necessarily fails, as it is founded on the assumption, that *Obadiah Green* claimed no interest, except in the one hundred acres. If the plaintiff be estopped, it is because *David Green* has been deceived by the conduct of *Watrous*. How can he complain? He attended the inquest, and well understood the nature of that proceeding. He was aware, that it was intended not to condemn the legal estate, but merely the interest which his father claimed in the four hundred and twelve acres. The condemnation and sale of his whole interest, was the only mode the plaintiff had to extinguish the claim, real or pretended, to the whole property. The plaintiff does not rest here. At the time of the sale he gave notice to all that were present, that he claimed the title to the land, and that he only sold the possession, or right and title of *Obadiah Green*, and that he had an ejectment pending for the title, and that he should go on with it. The sheriff also gave notice, at the same time, that he only sold *Green's* interest. The notice was repeated, and in the presence of *David Green* himself. How then can it be contended, with the slightest shadow of justice, that under the peculiar circumstances of this case, the plaintiff is estopped to assert his right to the land? We do not go on the ground, that estoppels are odious in law, for a man is always estopped to commit a fraud; and to say a man is not estopped, in some cases, would legalise fraud. If *David Green* had been in error in this transaction, and that error had been produced by the plaintiff, he might with some colour of justice, have complained against the plaintiff, and we would have supported him in the allegation of an estoppel. If he was deceived, it is apparent he deceived himself. The plaintiff had no hand in it, for he has done every thing which a prudent man was bound to do to avoid mistake. There is no resemblance between this case and *Willing v. Brown*, 7 Serg. & Rawle, 468. It would have been against equity to permit *Francis West* to contradict a sale which had been made with his privity and consent. It would have enabled him to commit a fraud on an innocent *bona fide* purchaser, without notice of his interest.

The jury find the whole amount of the four hundred and twelve

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acre tract of land, deducting the one hundred acres described in the original agreement, made with *Thomas Overton*, agreeably to the award of *Jonah Brewster, Benjamin T. Case* and *George Cone*. This is substantially a finding for the plaintiff for three hundred and twelve acres and eighty perches, the residue of the tract after deducting one hundred acres. There is a sufficient certainty in the verdict to enable the court to give judgment, and the sheriff to deliver possession on a *habere*; for by reference to the award, there will be no difficulty in locating the one hundred acres, the residue, viz. three hundred and twelve acres and eighty perches, the jury have found for the plaintiff. The verdict is equally certain, as the award of referees in *Santee v. Keister*, 6 Binn. 36, which was an award in favour of the plaintiff in ejectment, agreeably to the decision of the board of property. There is the same reason, as in that case, that we should give the verdict and judgment of the court a candid and liberal construction. It is always with reluctance that we listen to critical objections tending to destroy them. By an application of the maxim, *id certum est, quod certum reddi potest*, we have such certainty as is required for the purposes of substantial justice, nor will it infringe the maxim, "*Oportet, quod res certa deducatur in judicium.*"

Judgment affirmed.

[SUNBURY, JULY 3, 1828.]

DONLEY and another, Assignees of M'KEAN, against
HAYS.

IN ERROR.

Where a mortgage is given to secure a debt, but the eight accompanying bonds are for instalments of the debt, payable at various periods, five of which bonds the holder assigned to different persons at different times, retaining three of the bonds himself, and the fund arising from the sale of the mortgaged premises, by execution against the mortgagor, falls short of the whole mortgage debt, the respective assignees and the mortgagee, are entitled to a *pro rata* dividend of the proceeds, according to the amounts of their bonds by them held.

WRIT of error to the Court of Common Pleas of *Lycoming* county.

In this amicable action for money had and received, the following case was stated for the opinion of the court, to be considered in nature of a special verdict, with leave to either party to take a writ of error.

"It is admitted, that two thousand dollars are in the hands of the sheriff, *Thomas Hays*, the defendant, for distribution, arising from the sale of the real estate of *James M'Affee*, at the suit of

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Isaac Walton, for the use of *Jeremiah* and *Moses Brown*. It is further agreed, that *James M'Affee*, by mortgage dated the 15th of *April*, 1818, conveyed the premises to *Isaac Walton*, to secure the payment of five thousand and thirty-six dollars, on the 15th day of *April*, 1824, which mortgage is the first lien on the real estate sold as aforesaid. The said sum of five thousand and thirty-six dollars, was payable in seven annual instalments by bonds given for the following sums respectively; viz:—

“1st instalment—six hundred and sixty-seven dollars—was payable on the 15th of *April*, 1818, and was transferred to *J. and M. Brown* aforesaid on the 3rd of *May*, 1819, and judgment obtained thereon, in the Court of Common Pleas of *Lycoming* county on the 12th of *May*, 1820.

“2nd instalment—five hundred dollars—was payable on the 15th of *April*, 1819, and was assigned to *Donley* and *Thomas*, assignees of *M'Kean*, on the 15th of *September*, 1819, and judgment obtained thereon in the court aforesaid, on the 8th of *May*, 1820.

“3rd instalment—for five hundred dollars—was payable on the 15th of *April*, 1820, and transferred to *John Cowden*, and judgment in the court aforesaid, on the 5th of *February*, 1823.

“4th instalment—for eight hundred and forty-two dollars and twenty-five cents, payable on the first of *April*, 1821, and transferred to *John Cowden*, and judgment obtained on the said bonds in the said court on the 6th of *May*, 1822.

“5th 6th and 7th instalments—eight hundred and forty-two dollars and twenty-five cents—each payable on the 15th of *April*, 1822, 1823, and 1824, remain in the hands of *Isaac Walton*, the mortgagee, without any judgment obtained thereon.

“The above seven bonds embrace the whole of the debt secured by the mortgage.

“The mortgaged premises were sold on the 8th of *October*, 1825, for two thousand dollars, by the defendant, sheriff, &c., by virtue of a judgment, *fieri facias*, and *venditioni exponas*, obtained on the first instalment, for the use of *J. and M. Brown* above-mentioned.

“If the court are of opinion that the mortgage bond on which the judgment was first obtained, should be first paid, then judgment for the plaintiffs for the amount of their claim.

“But, if they are of opinion that the proceeds of the sale should be distributed, *pro rata*, among the creditors having a lien by virtue of the mortgage, then judgment, *pro rata*, for the plaintiffs; the amount to be ascertained by the attornies of the creditors.

“If the court are of opinion that the mortgage bond first due is entitled to priority of payment, then judgment for the plaintiffs for the amount of their claim; and, if they are of opinion that the bond first assigned or transferred by *Isaac Walton*, is entitled to be first paid, then judgment for the plaintiffs for the amount of their claim.

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"But, if the court are of opinion that the bonds assigned and transferred by *Isaac Wallon*, the mortgagee, ought to be paid, *pro rata*, in exclusion of the bonds remaining in his hands, then judgment, *pro rata*, for the plaintiffs, the proceeds of the sale to be distributed among the judgments of *Donley* and *Thomas, J.* and *M. Brown*, and *J. Cowden*, the respective shares to be ascertained by their attorneys."

The opinion of the Court of Common Pleas was "that the money raised in this case, be paid according to the priority of the time of payment of the instalments becoming due on the mortgage. That there can be no apportionment, but that the first instalment shall be paid first, and the other instalments as they become due, so far as the money will reach. That the holders of the remaining bonds which remain unpaid, will have to resort to other property of the mortgagor, if any there be, and that judgment be entered accordingly."

The cause was fully argued in this court at the last term, by *Merrill* and *Anthony*, for the plaintiff in error, and by *Armstrong* and *Campbell*, *contra*.

The opinion of the court was delivered by

TOD, J.—(After stating the facts of the case.)—We have no direct precedent to guide us. The case itself could scarcely arise unless by an uncommon depreciation of land. Clearly, the money in the sheriff's hands must be considered as if raised by sale of the land upon the mortgage itself: the mortgage being the first lien. It is remarkable that the seven bonds are not mentioned in the mortgage, nor any thing said of instalments. The instrument recites a debt of five thousand and thirty-six dollars by a writing obligatory, payable on the 15th of *April*, 1824. But, in fact, this sum was divided into seven bonds. Whether there is any right of priority among the assignees, is the chief question. The word "assigned" and the word "transferred," seems to be made use of in the case indifferently. It is not stated whether the bonds were assigned in form, or whether they were handed over with endorsement of the name merely, or handed over without any indorsement at all. And, in my opinion, it is immaterial how the transfers were, provided there was no guarantee. It is settled, that the word "assign," implies no guarantee. Nor was there any assignment or transfer of the mortgage itself, except what is implied by passing the bonds: nor any promise or representation holding out a preference in payment. Indeed, nothing appears in the case to show that in point of fact, the subject of priority of payment was in contemplation of any of the parties: and no contract to that purpose can be implied, except what the law implies. All the parties must have been aware, that no *scire facias* could be sued upon the mortgage until a year after the day of payment. Whether the other bonds had been transferred, or whether they remained still in the hands of

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Walton, does not appear even to have been known to the several assignees.

In this case, under the circumstances of it, I take the rule to be, that the holders of the bonds are to come in each one for his equal proportion and no more. Perhaps no case on either side directly in point can be found in the books. Some cases resembling this in principle might be mentioned, in which a preference such as is here claimed, could most clearly not be permitted. A man dies insolvent in part. He owed two bonds, both due to the same person, who has transferred the first bond to A., and the other, on the next day to B. The estate pays fifty per cent.; and A. insists that he, holding the bond first payable and first assigned, is entitled to his whole debt, and that B. is entitled to nothing. Again, a father, as sometimes happens, divides his estate among his children by assignments of bonds and notes. After a while, upon a loss happening, one, two, or three, of them, discover that their assignments were first made, and claim the whole of the money. Or, a holder of twenty bank shares, assigns them on twenty different days, to twenty different persons, and upon winding up, a loss happens: I believe it never would be contended that the owner of the share first assigned, shall be indemnified, and his share made up to its full nominal amount, at the expense of subsequent assignees. It is said, the bank shares are entirely separate and distinct things; and are connected so far only as that a common fund gives them their value, and that they are assignable by the express terms of the law: it might be suggested in answer, that so were *Walton's* bonds separate and distinct things, and connected by deriving all their value from a common fund, the mortgage, and by express law are assignable.

Equality is equity. One important head of equity and of law too, is average contribution: by which an unexpected loss shall be divided among all who are concerned in the matter, in proportion to their interests.

The doctrine of *prior in tempore*, is, I think, misapplied to this case. Priority of grant, I can understand. So, priority of judgment: for, a judgment may be considered, *pro tanto*, a grant of land. But a grant of land gives no prior right to a tract of land adjoining. Here the bond assigned to *Cowden* was not the same that had been assigned to *J.* and *M. Brown*, but a totally different instrument. It is as precisely the business of the mortgage to protect the last bond as it is to protect the first. It is as old a lien for the one, as for the other. I admit the doctrine, that a man shall not transfer a better right than he himself has: but, in my apprehension, the doctrine is inapplicable to the case.

We ought to give as little room as possible for uncertainty and litigation. Bonds are frequently sold, handed over, deposited, pledged, without assignment. Who will ascertain the date of these things? And who does not see, not only mistakes without number, but the temptation to fraud, and the facility of committing it, by

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antedating a transfer, if the whole value of the instrument is to depend upon the date of the assignment?

The general doctrine is supported by the following cases. In *Carpenter v. Carpenter*, (1 *Vernon*, 440,) where a man had conveyed land to raise money for his wife, and another sum for the issue, the fund proving insufficient, the chancellor decreed that the jointress and the issue should contribute proportionably to the loss, *because they claim by the same settlement*.

In *Braithwait v. Braithwait*, (1 *Vernon*, 334,) by the deed constituting the fund, the portions of the children were directed to be paid according to their seniority; yet a deficiency happening, it was decided by the court against the words of the deed, that the loss should not be thrown upon those who were last to be paid, but should be divided among all the children.

In 2 *Chan. Rep.* 155, legatees were decreed to abate in proportion, notwithstanding an agreement to the contrary.

In *Brown v. Allen*, (1 *Vern.* 31,) decreed, that a pecuniary legatee should abate in proportion with the rest, though his legacy was directed to be paid in the first place. The same decision in 2 *Ves.* 420. And Lord HARDWICKE has fully confirmed the doctrine. 3 *Atk.* 100. And in *Eure v. Eure*, (1 *Eq. Cas.* 115,) where a rent charge of ten pounds was devised to A., and the same annual sum out of the same land given to B.; it was held, that as the land was insufficient for both, they should lose equally.

Applying the principles to the present case; and without evidence of any compact between the assignor and assignees of the bond, I am of opinion, that there is no preference implied by the law, and that the bonds are to be paid in equal proportions.

It follows, that *Walton* is entitled to an equal dividend with the rest, on the three last bonds; because he has never parted with them, nor with any right connected with them. It seems impossible for us to decide that *Walton* is not entitled, when we say that an assignee under him would be entitled to a dividend of the money. There appears no fact nor principle, to exclude *Walton*. There is no warranty in his transfer express or implied. So far from there being any assignment by him of his whole right in the mortgage, there is no assignment of any part of it, except what is implied by the transfer of the bonds. If *Walton* has imparted no preference to others, he certainly must be considered as retaining his right of equality. All this I believe to have been intended by the parties at the times of the transfers. If they meant otherwise, I am only sorry that they did not express their meaning, as it was very competent and easy for them to do. We must adhere to the rule, which, unless there is some agreement to the contrary, in cases of this kind, throws the loss in equal shares upon all the owners. Judgment reversed, and judgment that the money be distributed to all the holders of the bonds, *pro rata*, according to the debt and interest due at the time of the sheriff's sale.

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GIBSON, C. J.—Contribution obtains among such as stand in equal equity; and the question is, whether the parties stand so here. The facts are these:—A bond and mortgage were given to secure a debt, which was at the same time divided into instalments and included in other bonds; several of which have been assigned to different persons in the order in which they fell due, and the fund obtained by a sale of the mortgaged premises is found to be insufficient. It is contended on the one hand, that the bonds are entitled to priority in the order in which they were assigned; and on the other, that all ought to participate in the benefit and contribute to the loss.

I shall consider whether the assignor is in equal equity with the assignees; and if not, whether subsequent assignees are in greater equity in regard to those that precede them, than the assignor whose title they bear.

First, as between the assignor and the assignees. It is conceded that the assignor of a bond is not bound to see it paid, the covenant which is implied from the word "assigned," extending no further than that the assignee shall receive the money to his own use, or that the assignor will account for it if received by him; and it is settled that an action will not lie on any other covenant or promise arising out of the contract of assignment. But, the assignor may, notwithstanding, contract a moral obligation, which, although insufficient to raise a promise by implication, is a sufficient foundation for an equity, to the existence of which a legal obligation is not at all indispensable. Suitors are driven into chancery only because their demands are not founded on a legal obligation. The equity in the case before us, would be termed in the civil law, a duty of imperfect obligation; and it is entitled to a decisive influence in the exposition of stipulations that admit of interpretation. In *Mackie's Executor v. Davis*, (1 Wash. Rep. 219,) where an action was sustained on the contract of assignment, it was held that it created even a legal obligation; and such is still the law of *Virginia*, although it is otherwise in *Pennsylvania*, *Jersey*, and most of the other states. But, although an action be not sustainable on the contract, the assignment is evidence of indebtedness, *dehors*, which is not extinguished by accepting the thing assigned; else it were difficult to sustain the decision in those cases, where the subject of the assignment having proved unproductive, the assignee has been allowed recourse to the assignor on the original contract. It is curious to trace the progress of the courts in their struggle to escape from the principle with which they set out, that the transfer of money or securities, was to be governed by the rule so beneficially applied to the transfer of other chattels, in respect of which the law implies a warranty of the title but not of the quality; a rule of inestimable value, when restrained to the sale or exchange of commodities, but altogether unfit for the regulation of payment in coin or securities. Lord COKE relates (*Wade's Case*, 5 Rep.

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115,) that it was determined in *Vane v. Stanley*, that a party who had received money without objection, was concluded and the debt discharged, though he had discovered the money to be counterfeit before he left the place: And in *The Bank of England v. Newman*, (1 *Lord Raym.* 442,) it was held, that discounting a bill without endorsement, precluded the bank, the drawer having become insolvent, from recovering the money advanced as so much lent. But, in *Tassel v. Lewis*, (1 *Lord Raym.* 743,) the same judge held that payment in goldsmith's notes, (a species of negotiable paper having the essential properties of bank-notes,) would be at the risk of the party receiving, if he did not immediately call on the goldsmith for the money: in other words, that the debt would not be discharged if the drawer were insolvent at the time. This was a step in advance, and taken even by Lord Holt. At present the courts have, by a variety of decisions, reached the point of permitting the seller of goods to proceed on the original contract, notwithstanding there may have been payment in counterfeit notes or worthless securities, wherever it cannot be shown that he agreed to stand to the risk. Whether they will ever arrive at the point allowed by the Court of Appeals of *Virginia*, and sustain an action on the contract of assignment, is unnecessary to the argument; it being sufficient that they have been drawn from their ground by a clear, indisputable, and overpowering equity on the part of the assignee, which necessarily arises whether the transfer be affected by delivery or a written assignment.

If the existence of a particular equity be established, the contract is to be construed as beneficially in accordance with it, as the words will bear. Here the debt was the principal and the mortgage an accessory; consequently, the assignment of a particular part of the debt, was an assignment of the mortgage, not *pro rata* but *pro tanto*. Without evidence of a special agreement, we are not to intend that the assignee consented to receive the bond without the mortgage, as a security for the whole sum due, for the same reason that a note received as cash, is not to be treated as satisfaction without proof of its having been so considered by the parties. The assignee may doubtless have obtained the bond at an under value, in consideration of agreeing to let the assignor into an equal participation of the mortgage fund: but a plain answer to this is, that nothing of the sort is to be found in the case, and it may be affirmed on authority, to be drawn from analogy, that the law will not imply it. The adequacy of the consideration can be allowed to operate only where the terms of the assignment are doubtful, and then only as a circumstance to be left to a jury.

The vendor of part of an estate which he has encumbered by his own act, cannot demand contribution of the vendee, being bound both at law and in equity, to apply the residue in satisfaction of the debt. (*Nailer v. Stanley*, 10 *Serg. & Rawle*, 450. *Clowes v. Dickinson*, 5 *Johns. Ch.* 235.) Yet the vendee might, with equal plau-

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sibility, he said to have got the estate at an under value, in consideration of its bearing a share of the burden on the whole. But the vendor is bound to discharge the encumbrance in case of the vendee, even where the latter has not paid a valuable consideration, (*Sir William Harbert's Case*, 3 Rep. 12.) And why shall not the assignee of a chattel have the full benefit of the thing, whether the bargain be a good or a bad one? The vendor of part of an estate, burdened with a rent charge, may no doubt compel contribution by his own vendee; which apparently is nearer to the case under consideration than that of an estate encumbered by the vendor himself. This case of the rent charge is compressed in a short note, (1 *Eq. Ca. Ab. Contribution*, A. 1;) but the difference seems to arise from the rent being of the essence of the land out of which it issues, and incapable of separation from it, in consequence of which, the vendee must, from the very nature of the thing, purchase subject to the encumbrance; whereas, in the other case, the land is only secondarily liable, being chargeable as surety for what is the personal debt of the vendor, who is bound for the whole. But there can be no safe analogy in this respect between the conveyance of land in regard to which the maxim is *caveat emptor*, and the assignment of a chose in action which, in consideration of the price paid, *ipso facto*, induces a moral obligation to make the thing assigned as available in the hands of the assignee as it purported to be in the hands of the assignor.

My position is, that the assignee is a purchaser for a valuable consideration of all the SECURITIES of the assignor, (*Martin v. Mowlin*, 2 Burr. 978, *Jackson v. Willard*, 4 Johns. 41,) and of all his REMEDIES, (1 *Mad. Ch.* 435,) and may use them in any way he may think proper, as freely and as beneficially as could the assignor himself, to whom it was indisputably competent at the time of the assignment, to order the mortgage to stand as a security, in the first place, for the instalment due on the particular bond.

If such then be the rule of priority between the assignor and assignee, it is easy to show that it holds among assignees in succession of separate parts of the same debt. In *Clowes v. Dickinson*, already cited, the question of contribution, which was among purchasers of separate parts of an encumbered estate, was determined on the principle, that subsequent purchasers can stand in no better equity than he from whom they purchased. *Prior in tempore potior in jure*, is a maxim which concerns equitable as well as legal rights; and to which there is no exception but the case of a subsequent encumbrancer who has got in the legal estate, of the benefit of which chancery will not deprive him, unless he has had notice of the prior encumbrance, without which there is equity against equity, and the party having the legal title will prevail. The cases on the subject may be found in 1 *Fonb.* 310, note, (e), from which it is conclusively deducible, that the purchaser of an equitable title is not to be affected by a sale to a subsequent purchaser of the same

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title without notice; just as the purchaser of a legal title would, at the common law, not be affected by a sale to a subsequent purchaser of the same title without notice. With us this principle has been changed by statute as regards *land*, but it still holds as regards chattels. None but a purchaser of the legal title can insist on being placed on higher ground than was occupied by him from whom he purchased; and, that even he can do so, arises from the peculiar hardship which there would be in subjecting the purchaser of a title perfect on its face, to latent equities against which it was the duty of the *cestuy que trust*, or encumbrancer to put him on his guard. In this case, had the subsequent assignees obtained a *legal* assignment of the mortgage, it would have made a difference: for as there would have been equity against equity, the legal title must have prevailed. But as neither party has any thing but an equity, priority of title is priority of right. If the subsequent assignees could set up want of notice at all, it would carry their rights beyond mere participation, and postpone the prior assignees altogether; thus, inverting the order of priority, in which it seems to me they ought to stand. Is there even an apparent hardship in postponing the assignee of a bond secured by a mortgage, who has not record notice of prior assignments of other bonds secured by the same mortgage? His case is no worse than that of a purchaser of the legal title who has neither had notice nor the means of obtaining it. A mortgage is the subject of a legal assignment, because the mortgagee has the legal estate in the land; but the interest on a mortgage which passes by the legal assignment of a bond secured by it, is a mere equity, and the assignee as in *Whitfield v. Fausset*, (1 Ves. 391,) must, therefore, abide by the case of the assignor.

I am of opinion, that the money in the hands of the defendant, should be applied in satisfaction of the bonds in the order in which they were assigned.

SMITH, J., did not hear the argument, and took no part.

Judgment reversed, and judgment of distribution as above.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT, SEPTEMBER TERM, 1828.

[PITTSBURG, SEPTEMBER 10, 1828.]

CHESS *against* CHESS and others.

APPEAL.

A counsel may give evidence of what a witness, since deceased, swore on a former trial, from his notes, though he does not recollect the evidence independently of his notes, nor whether there was a cross-examination, and gives only the substance of the former testimony. 3 Casey
35-

But, if the witness is living in the county, the notes of his testimony are not evidence, though he has since the former trial become interested in the cause.

APPEAL from the decision of HUSTON, J., denying a new trial, at a Circuit Court, held for *Allegheny* county, *August*, 1828, in ejectment for land claimed by the plaintiff under a deed from *William Chess*, father of the plaintiff, and also father of the defendants. Incapacity in the grantor was objected: and fraud in obtaining the deed. The verdict was for the defendants. The plaintiff applied for a new trial on three grounds. 1. Alleging that the judge permitted some of the defendants' witnesses to testify their opinion as to the sanity or insanity of the grantor, without obliging them to specify the facts upon which such opinion was founded. 2. There having been a former trial of the same cause between the parties, Mr. *Forward*, one of the counsel of the defendants, was permitted on oath to produce his notes of the former trial, to show what *Jacob Harger* and Mrs. *Chess*, both since deceased, had then testified. 3. That the judge permitted Mr. *Forward*, in the same way, to

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give evidence of what was sworn on the former trial by *Jacob Hays*, then a competent witness, but who had since become interested in the cause, by joining as surety with the defendants in a bond to the plaintiff, conditioned, in case the plaintiff recovers, to pay him for the coal dug by the defendants on the land, he, *Hays*, being still in full life, and residing within the jurisdiction of the court.

To introduce the testimony of the deceased witnesses, Mr. *Forward* being sworn, stated as follows:—"I was counsel for the defendants on the last trial—I took full notes of the trial—I took down the testimony of the witnesses in question. I believe the greater part is in the words of the witnesses. I believe I have the substance and nearly the words of the witnesses. The whole of it may not be in the very words. I don't recollect the testimony independent of the notes. I do not recollect any question put on the cross-examination, nor whether there was a cross-examination. I believe I put down what was stated by the witnesses in reply. I may have omitted to note what I supposed to be immaterial to the issue trying."

Burke and *Baldwin*, argued for the plaintiff. In their arguments they cited, on the first point, 1 *Phil. Ev.* 227, *Ed.* 1823, *N. York. Swinburn on Wills*, 78. *Dickinson v. Barber*, 9 *Mass.* 228. *Hathorn v. King*, 8 *Mass.* 371. *Irish v. Smith*, 8 *Serg. & Rawle*, 573, 582.

On the second point.—*Lightner v. Wike*, 4 *Serg. & Rawle*, 203. *Miles v. O'Hara*, 4 *Binn.* 108. *Foster v. Shaw*, 7 *Serg. & Rawle*, 162. *Cornell, v. M'Cord's Administrator*, 10 *Serg. & Rawle*, 14. *Wolf v. Wyeth*, 11 *Serg. & Rawle*, 149. *Watson v. Gilday*, 11 *Serg. & Rawle*, 337, 342.

On the third point.—1 *Salk.* 286. *Barker v. Lord Fairfax*, 1 *Stra.* 101. 1 *Eq. Ca. Ab.* 224. *Norris's Peake*, 89. 14 *Mass.* 234. 17 *Johns.* 179. *Lautermilch's Executors v. Keagy*, 3 *Serg. & Rawle*, 202. *Lessee of Hamilton v. Marsden*, 6 *Binn.* 45. *Irwin, for the use of Simpson, v. Reed*, 4 *Yeates*, 512. 1 *Stark. Ev.* 263. *Bull. N. P.* 239.

R. Wilkins and *Forward*, for the defendants, were requested by the court to confine their remarks to the third point. In their argument they cited, *Hamilton v. Marsden*, 6 *Binn.* 45. *Hiester v. Lynch*, 1 *Yeates*, 113. *Lessee of Willis v. Bucher*, 2 *Binn.* 467. *Keble v. Arthur*, 3 *Binn.* 29. *Griffith v. Willing*, 3 *Binn.* 320. *Tidd. Prac.* 740. 1 *Phil. Ev.* 267. *Engles v. Bruington*, 4 *Yeates*, 346. *Clark v. Anderson*, 6 *Binn.* *Purd. Dig.* 257. *Le Baron v. Crombie*, 14 *Mass.* 234. *Gold v. Eddy*, 1 *Mass.* 1. *Jones v. Mason*, 2 *Stra.* 833.

The opinion of the court was delivered by

TOD, J.—Whether the witnesses could give opinions without facts, is a point which, we think, does not arise in the case; because, every

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witness appears to have mentioned some fact of some sort, upon which he grounded his opinion.

On the second point.—The evidence by Mr. *Forward*, showing what the two witnesses, since deceased, had sworn on the former trial, is objected to, because Mr. *Forward* did not recollect their testimony independent of his notes, because he did not recollect the cross-examinations, and because, even with the aid of his notes, he would not undertake to give more than the substance of the former testimony. It has been strongly urged by the plaintiff's counsel to be the uncontested modern doctrine of the law, that a person admitted to prove what has been formerly sworn by a witness since deceased, must repeat the identical words of the first witness, or he cannot be heard. This strictness, this nicety is not, as I take it, required in *Pennsylvania*. In the first case on the subject, *Miles v. O'Hara*, (4 Binn. 110,) TILGHMAN, C. J., indicates his opinion unequivocally, that no witness, in giving this sort of second hand evidence, is bound to the precise words, and that no note taken is expected to set down all the tedious and superfluous matters with which an account of facts may be encumbered; and that swearing to his belief that the notes contain the true substance, is sufficient. It is said, these were but *dicta* of the chief justice, which were not adhered to in the subsequent cases of *Lightner v. Wyke*, and *Wolf v. Wyeth*. But, certain it is, that in the very last case on this head, a case most full to the point, *Cornell v. M'Cord's Administrator*, (10 Serg. & Rawle, 14,) those *dicta* of the chief justice were reasserted by the whole court. As to Mr. *Forward's* not remembering the cross-examination, there was no proof of any cross-examination in the case, much less, was there proof that the cross-examination produced any matter worth remembering. The rule of law is undisputed, that what a witness who dies had sworn to on a former trial between the parties is evidence, if it is preserved and can be repeated, and shall not inevitably perish by the death of the witness who gave it. But, if this sort of evidence must be suppressed altogether, if not repeated in the precise identical words of the first witness, and he who is to state it is to be stopped at once unless he binds himself by oath to all the very expressions, then I apprehend the legal right to offer such proof is merely nominal, and never can be exercised. For I hold it to be impossible, that any person worthy of credit, attending without any interest of his own to the evidence in a cause, will five years afterwards, as in this case, or five months afterwards, undertake upon his oath, to repeat that evidence word for word. Equally impossible, in my opinion, it will be to find an advocate or judge, so accurate and laborious as to set down all the expressions of the witnesses in a long trial, whether to the purpose or not to the purpose. Without notes one may remember substance. But that he should after a lapse of years be able to state correctly mere words, and all the words, without having taken any note in writing at the time, is, I think, out of the

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question. In the present case, the only chance of approaching to the precise language used by the witnesses, dead since the former trial, must be from the notes of the judge or the counsel. In slander, which, perhaps, more than any other action, depends upon identity of expression, a witness is never obliged to remember every word spoken. Without pretending to give all, he may give what he does remember. In case of proof by parol of the contents of a deed or written instrument, lost, or withheld by the opposite party, it was never heard of, that a witness was stopped unless he would promise on oath to repeat the written instrument *verbatim*. I cannot find, that this nicety of giving the indetical words of a deceased witness was ever required, or so much as mentioned in any *English* book down to the time of *Rex v. Joliffe*, and then only in a *dictum* of Lord KENYON. See *Vin. Ab. Evidence*, T. B. 88, pl. 4. *Taylor v. Brown*, T. Raym. 170. *Anonymous*, 2 Show, 163. *Pyke v. Crouch*, 1 Lord Raym. 730. *Patton v. Walton*, 1 Stra. 162.

When the counsel for the plaintiff argue how imperfect this sort of second hand evidence must be, particularly when coming from counsel, tinged by all their prejudices in favour of their own client, they say nothing but what I most fully concur in. It is evidence which has in it nothing like the sanctity of a deposition. It specially requires the good sense of a jury. Counsel may sometimes take notes chiefly to assist their own arguments. They may set down part, and trust to memory for part. But, if the notes on one side are not fully trusted, what more obvious correction than to have the notes on the other side produced and sworn to, if they can be sworn to, or the notes of the judge, or recourse had to the memory of jurors, or other persons present, if it shall be insisted, that memory is safer than writing?

But there is another point of much more difficulty: whether evidence of the former testimony of *Robert Hays* could be received, he, *Hays*, being yet in full life, and residing in the county, but excluded from his oath by subsequent interest in the cause. It is contended, on the part of the defendant, that evidence legal and true in 1823, must, in the same case, between the same parties, be legal and true in 1828: and the invariable practice in chancery, and positive authority of all the cases in equity, for two hundred years, are relied on, backed, as supposed, by the decision in *Hamilton's Lessee v. Marsden*, (6 Binn. 45.) I agree, that in argument, it may be hard to show, since truth and fact must ever continue the same, how, when once declared by a competent witness, they can cease to be truth and fact, or how they can be tainted by a subsequent unforeseen interest being thrown upon, or assumed by the witness. But still I must come to the conclusion, that the law is settled the other way, settled beyond the reach of argument. It is admitted, that such evidence is forbidden by the common law. The rule of chancery has not been adopted in *Pennsylvania*, but expressly re-

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jected. *Irwin, for the use of Simpson, v. Reed*, (4 Yeates, 511,) seems conclusive. All the court there agreed that such evidence had never been admitted: and the case appears to be not in any respect contradicted by *Hamilton's Lessee v. Marsden*, (6 Binn. 45.) Even suppose a manifest improvement in adopting the chancery practice, yet it seems of the first importance, that the rules of evidence should be steady, and leave as little as possible to the discretion of the judge. If an improvement, it is one which seems beyond judicial authority. We may well repeat the question which was asked by one of the judges in *Irwin, for the use of Simpson, v. Reed*, whether the party himself shall be next called to testify in his own case, according to the practice of chancery? We know the usage has always been for chancellors to trust themselves with evidence which never in any case has been permitted to go to a jury. On the very page in 1 *Eq. Ca. Ab.* (224,) whence has been read one of the chancery cases in this argument, we find it laid down as the law of evidence in equity, that a legatee of a small legacy, as five shillings to a private person, and five pounds to a nobleman, may be a witness to support the will, graduating by a most uncertain rule, if rule it can be called, the competency of the evidence by the rank of the witness, and the amount of the temptation. Therefore, we think, in point of law there was this error, which we apprehend to be material, in admitting Mr. *Forward's* evidence of the previous testimony of Mr. *Hays*. And we award a new trial. Upon the merits of the cause on matters of fact, which have been argued on both sides, we give no opinion.

New trial awarded.

[PITTSBURG, SEPTEMBER 10, 1828.]

GRAY *against* HOLDSHIP.

APPEAL.

A copper kettle or boiler in a brewhouse, is part of the freehold, and subject to the mechanics' lien law.

THIS was an appeal from the judgment of the Circuit Court of *Allegheny* county, and was argued by *Burke* and *Selden*, for the plaintiff in error, and *Fetterman* and *Baldwin*, *contra*.

The opinion of the court was delivered by

SMITH, J.—The declaration is in *assumpsit*, and contains the usual money counts, with a special count for the use and occupation of two houses in *Pitt* township, and for the use of a copper boiler in a brewery. The cause was tried at the last Circuit Court for this county, (on the 30th of *August*, 1828,) before Justice

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HUSTON, when a verdict and judgment were rendered for the defendant. A motion for a new trial being made and overruled, the plaintiff thereupon appealed.

It appeared in evidence, that in the year 1822, a Mr. *Grenough* had issued a landlord's warrant for arrears of ground rent, due from certain premises, situate in *Pitt* township, on which there were several buildings, at that time occupied as a brewery. Under this warrant, the bailiff of *Grenough* levied on a brew-kettle, or copper-boiler, set up in the brewery, and fixed in its proper place. The bailiff loosened it and took it out of its place, and moved it to the door of the brewery, out of which it could not be taken. The representatives of *Robert Graham*, deceased, holding the premises under a certain deed, (called, and well understood here by the name of a *perpetual* lease,) had rented them to *Andrew Scott*, who, at the time of *Grenough's* warrant, was in possession. The administrator having borrowed two hundred dollars from *James Gray*, the plaintiff, with that money paid the rent aforesaid, and redeemed the brew-kettle, pledging it to *James Gray* for the money so borrowed, and agreeing that it should be his if the same were not refunded within sixty days. The money was not repaid, and both the administrator and the plaintiff regarded the kettle, after the expiration of the sixty days, as the property of the latter. The plaintiff, accordingly, hired it to *Scott*, who agreed to pay him for its use. It was also proved, that the first building on the premises had been erected many years ago, and used for a distillery; that an addition was built in 1816 or 1817, and that the brew-kettle in controversy, was manufactured and fixed in the additional building in the year 1819, for a brewery. It was further proved, that the business of brewing could not be carried on without a brew-kettle or boiler, and is so essential, indeed, that a brewery would be worth nothing without one.

On the 10th of *May*, 1820, *Henry Holdship*, the defendant, filed a mechanics' lien against the former owners, *Caldwell* and Company, upon the premises in question, for three thousand dollars, issued a *scire facias* thereon, and obtained judgment for one thousand eight hundred and seventy-three dollars and eighty-five cents, on which a *fieri facias* was levied on the property where the brewery stood with the appurtenances. The property was condemned, sold, and bought by *Henry Holdship*, who claims the copper-kettle or boiler; the value of which is the object of this suit.

Although the plaintiff assigned four reasons for a new trial, two questions only have been raised on the argument, and need be considered in deciding the case. The first is, was the brew-kettle a fixture annexed to the freehold, and so real estate; or was it merely personal property? In the time of Lord COKE, the general rule was, that whatever was once annexed to the freehold, became part thereof, and could not be afterwards separated, but by him who was entitled to the inheritance; to have taken it away, would have

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been waste in any other person. Indeed, the law is thus laid down in all the old, and recognised to have been so in the more modern cases. This rule, however, has been relaxed, especially in cases between landlord and tenant, and is made more favourable to the latter. Where a man for instance, rents a house, a mill, or a shop, and for his own convenience, puts stoves in the house, or a packing press, or elevators in the mill, or a crane and pulley, or other like thing in the shop, the tenant may remove any of the articles thus put up for his own convenience or advantage. This, I consider well settled. As to the full extent of the rule in its application to the various classes of cases and persons, it is unnecessary here to give an opinion.

From the adjudged cases on this subject, I think we are warranted in saying, that every thing put into, *and forming part of a building*, or machinery for manufacturing purposes, and essential to the manufactory, is part of the freehold; the wheels of a mill, the stones, and even the bolting cloth, are parts of the mill and of the freehold, and cannot be levied on as personal property. If the law were otherwise, it would produce great hardships, and manifest injustice; for, if I should devise my mill to one of my children, and give all my personal property to another, would any one dream, that the wheels, stones, and cloths, of the mill, could justly be taken by my executors, and sold as personal property? But, admitting the law to be so, it is, nevertheless, contended, that this copper-kettle or boiler, is not a fixture, because, it was not placed in the building when it was erected, was easily removed, and was, therefore, merely a chattel. Several cases were cited to support this position, and great reliance was placed on the case in 14 *Mass. Rep.* 352, in which Chief Justice PARKER did consider three carding machines in a wool carding factory, as personal property. Upon an attentive examination of that case, I cannot think that it essentially resembles the one under consideration. There the carding machines were not a necessary part of the manufactory, and essential to its operations. Nor were the three machines therein mentioned, in strictness, fixtures; for it clearly appears, that they *stood on* the floor of the factory building, that they were not *nailed to* the floor, nor in any manner attached or annexed to the building, except by a leather band, which passed over the wheel or pulley, to give motion to the machines. Now, in the case before us, the boiler was fastened and fixed in the building, and it is plain, that it must have been so, to be serviceable or beneficial. When a brewery is about to be erected, a particular place is assigned for the boiler, which is carefully walled in, and is as necessary to the brewery as a chimney to a house. All the witnesses said, that this copper boiler was an essential part of the brewery, without which, the business could not be commenced nor carried on. This boiler, therefore, could not be levied on, or sold as personalty, and the administrator of *Graham* could not lawfully pledge it as such. The

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cases cited from 15 *Mass. Rep.* 159, in which it was decided, that a dye-kettle fixed in brickwork in a fulling mill, was a part of the realty, and that from *Mason's Rep.* 459, in which Justice STORV, after a careful review of all the cases on the subject, decided, that the main mill-wheel and gearing of a factory attached to the same, and necessary for its operation, are fixtures and *real estate*, are, in the opinion of this court, decisive of the first question.

As to the second question, whether the boiler, if it were a fixture, being severed from the freehold, at the time of the sale or transfer to *Gray*; may not, therefore, be held under that transfer? we deem it only necessary to remark, after what has been already stated, that as it was not severed from the brewery by the owner of the freehold, it remained part thereof, and *James Gray* could not, under the circumstances, derive any advantage from that transaction. Besides, the mechanics' lien had attached before the boiler was severed and before the transfer to him. In *Sheph. Touchs.* 90, it is laid down, that "that which is parcel or of the essence of a thing, although at the time of the grant it be actually severed from it, does pass by the grant of the thing itself. And, therefore, by the grant of a mill, the mill stone doth pass, although at the time of the grant it be actually severed from the mill. So by the grant of a house, the doors, windows, locks, and keys, do pass, as parcel thereof, although at the time of the grant they be actually severed from it." As there was no severance here at any time, before the mechanics' lien had completely attached, the plaintiff cannot hold the boiler under the transfer. The judgment of the Circuit Court must therefore be affirmed.

TOD, J.—I am not able to agree entirely with the rest of the court. The old rules of the common law about annexation to the freehold, have been much relaxed in modern times in favour of trade and manufactures. *Holdship* was employed to put up the building: therefore, I admit, his lien under the act of assembly covered not the house only, but the lot on which the house stood. But, in my opinion, it did not affect the copper boiler, which was set up, not by *Holdship*, nor at his expense, but by *Graham*, then owner of the freehold, and this sometime after all *Holdship's* work had been finished. This copper boiler or brew-kettle, which by the way, was no inconsiderable part of the expense, which appears to have been set up in brick work in the middle of the brewery, was upon *Graham's* death, distrained on by the ground landlord for arrears of ground rent, amounting to two hundred dollars, and removed from its place, but not out of the building. Upon that, *Gray*, the plaintiff, by agreement with *Graham's* administrator, redeemed the property by advancing the two hundred dollars, the amount of the landlord's demand, stipulating with the administrator that he, *Gray*, should hold the copper boiler in pledge for the repayment of his money so advanced, and in default of payment by

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a certain short day, that he should hold the property absolutely. *Holdship*, the builder of the house, not having been paid for his work and materials, proceeded to enforce his lien by *scire facias* under the act of assembly. And, on *Holdship's* execution, the lot and the building were sold by the sheriff. *Holdship* himself became the purchaser, and under the purchase, he claims the copper boiler as a fixture annexed to and passing with the freehold. This action is brought in consequence of a special agreement between the parties to try their respective rights. My opinion would be, that *Gray's* title is valid to secure his money advanced and the interest upon it, and no more; and that *Holdship* has no title at all.

This is not a case of dispute between co-heirs or co-devisees, or between heir and executor, or a case of dower claimed out of the brewery, or a dispute between tenant for life and remainder man. I take it, a broad distinction has been established, and that as between mortgagee and mortgagor, and between landlord and tenant and all similar cases, fixtures for manufacturing purposes, and sometimes even for agricultural purposes, not consolidated with the walls nor incorporated with the freehold, set up by a mortgagor after the mortgage, or by a tenant during his term, may be removed, provided it can be done leaving the freehold property in as good condition as they found it. The present case seems in substance to be that of a prior mortgage, and afterwards an erection of fixtures by the mortgagor. If there is any difference, that difference is against Mr. *Holdship*: for certain it is, that a voluntary actual mortgage would appear to be stronger against *Graham* and against *Graham's* administrator than a mere implied mortgage or pledge by act of law to secure the builder's charges. I shall only refer, as shortly as possible, to some authorities which may seem to justify me in dissenting from the court. *Toll. Law of Exec.* 96, enumerates the things which may be removed from the freehold, and names *brewing vessels, vats for dyers, and soap boiler's coppers, provided it can be done without injury to the fabric of the house*; and this even between heir and executor. By 2 *Com. Dig. new Ed. Biens B. in note*, the removal of such fixtures may be made by the tenant after the end of his term. Lord *HARDWICKE* seems to have considered the point in question as so completely settled eighty years ago, that he brings it in by way of illustration of other cases supposed to be doubtful. The question being, whether a fire engine, set up for working a colliery, was personal estate, or part of the freehold, he says, *inter alia*, "But it has been insisted, that fixing it in order to make it work, is properly an annexation to the freehold. To be sure, in the old cases, they go a great way upon the annexation to the freehold, and so long ago as *Henry the Seventh's* time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground that courts have gone upon, of relax-

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ing the strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during their term." And, again: "*Coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire engines, and in brew houses especially, pipes must be laid through the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.*" He observes, "this is not a case between the ancestor and heir." *Lawton v. Lawton*, 3 Atk. 13.

In another case, where under a mortgage of a brew house, with its appurtenances, the utensils for brewing were claimed by the mortgagee, the same chancellor remarks, "I am inclined to think it was not the intent of the mortgagor to mortgage the utensils; for there is some description generally, of things in a brew house." The rule as to fixtures, as between an heir and an executor, is another thing, &c. How does it stand between a purchaser and a vendor? *If a man sells a house where there is a copper or a brew house where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass.*" *Ex parte Quincey*, 1 Atk. 477.

In *The Union Bank v. Emerson*, 15 Mass. 159, it was held, that a kettle in a fulling mill, set in brick work, passed by a mortgage of the mill, but the court expressly add, "Had the defendant, after making the mortgage deed, put this kettle into the mill, we should have considered him authorized to remove it before delivering possession to the plaintiffs."

14 Mass. Rep. 356, decides, that a carding machine in a wool factory, and 6 Johns. Rep. 5, that a stone for grinding bark, affixed to a bark mill, were no parts of the freehold. In 20 Johns. 29, tenant for years after the end of his term, was permitted to carry off a cider mill put up by himself. 17 Johns. 121, appears to be in substance the very case before us. It was a case of a mortgage. There were sundry carding and spinning machines and frames. The court held that such of the frames as had been put up subsequent to the making of the mortgage, did not pass to the mortgagee. The case of *Powell and Wife v. The Manufacturing Company, &c.*, 3 Mason, 549, cited for the plaintiff, appears to me inapplicable. Not only was it a case of the main mill wheel and gearing of a factory, but it was a case of claim of dower, and the fixtures had been erected by the husband himself. *Goddard v. Chase*, 7 Mass. 432, also cited by the plaintiff's counsel, was the case of a defendant, who, after his house had been transferred to a creditor by process of law, in satisfaction of a debt, re-entered and tore away some cast iron stoves from the chimneys: which, it was decided, he could not legally do. I take it, that in *Pennsylvania*, stoves and grates are generally considered personal property, certainly so as between landlord and tenant. The *Massa-*

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chusetts case appears to have been decided on its own circumstances: for it was in proof, that the appraisers of the house included the stoves in their estimate of its value, and that was one of the reasons given by the court for their opinion. Clearly, the creditor must have been held to be a purchaser of the stoves.

Another exception has been urged by the plaintiff's counsel. The judge rejected proof showing that *Holdship*, in order to procure a condemnation of the property, appeared before the inquest by Mr. *Forward*, his counsel, and insisted that the copper boiler in question, was no part of the levy, nor of the freehold, and being merely personal estate, ought not to be taken into the valuation. I agree with my brethren, that such proof was rightly rejected. I dislike this matter of giving the arguments of counsel in evidence against their clients. But, if instead of an argument upon the law, it had been an assertion of a fact, then I should hold the evidence to be legal, not only to show full notice to *Holdship* of *Gray's* title, but upon the principles established in the case *ex parte Quincey* and in the *Massachusetts* case of *Goddard v. Chase*, proving a very material thing, that *Holdship*, at the sheriff's sale, could not have intended to make a purchase of the copper boiler.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 23, 1828.]

IRWIN *against* TABB.

IN ERROR.

On a mortgage given to secure the payment of a sum of money to three absent persons, in different proportions expressed in the mortgage, two of whom had then paid up the sum expressed, and the third had not, but did so by advances soon after the mortgage, if they proceed to a judgment and sale of the property by execution, and the proceeds are not sufficient to pay all, they are to be distributed according to the sums expressed in the mortgage.

ERROR to the Court of Common Pleas of *Fayette* county.

Issue agreed upon in the court below, in which the defendant in error, *John Tabb*, was plaintiff below, and *Matthew Irwin*, the plaintiff in error, was defendant, to try the right of *Tabb*, the plaintiff, to the purchase money arising from the sale, by the sheriff, of the real estate of *Zadock Walker*, to the defendant, *Irwin*, under the circumstances, stated in the following charge, delivered to the jury by the president of the court below:

"It appears in evidence, that on the 20th of *April*, 1820, *Zadock Walker* executed a mortgage to *Matthew Irwin*, *William Rogers*, and *Ruth Tabb*, to secure the payment of eight thousand

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dollars, according to the following proportions, as expressed in the mortgage:—

"Matthew Irwin,	- - - - -	\$3000
"William Rogers,	- - - - -	3000
"Mrs. Tabb,	- - - - -	2000

"To March term, 1823, a *scire facias* was issued on this mortgage, and subsequently a judgment was confessed in writing by Mr. *Walker*, for seven thousand two hundred and twenty-eight dollars, and costs. At the time, and on the same paper, the respective interests of the mortgagees were adjusted and liquidated by Mr. *Rogers* and *John Tabb*. An execution was taken out, and the property was sold to *Matthew Irwin* for ———, a sum considerably less than the amount of the debts, as thus ascertained. A calculation was made by the sheriff, taking the mortgage itself as the rule, and Mr. *Irwin* gave a receipt for his proportion, and the other shares were paid into court, and afterwards received by the attornies of *Rogers* and *Tabb*. The distribution thus made, would appear to be perfectly fair, if the amount stated in the mortgage had really been paid by the mortgagees to *Walker* previous to its execution. But it is alleged on the part of Mr. *Tabb*, (who is the legal representative of *Ruth Tabb*,) that at the time the mortgage was given, the debt actually due by *Walker* to *Irwin* was considerably less than the amount stated as his share. Assuming this to be the fact, the plaintiff presents a question for our legal determination. Shall the rights of the mortgagees be adjusted according to the respective sums stated in the mortgage, or according to the actual state of their several credits with the mortgagor at the time? It is said, that the whole sum of three thousand dollars had not in fact been received from Mr. *Irwin*, but that it was intended to include future advances, which Mr. *Walker* expected shortly to receive. Mr. *Thomas Irwin*, who drew the mortgage, stated, that this was declared to him by Mr. *Walker* at the time. No one of the mortgagees, however, were present, nor does it appear, that any of them had any knowledge of the execution of the mortgage: nor have we any evidence, that Mrs. *Tabb* or Mr. *Rogers* were acquainted with the state of the account between Mr. *Walker* and Mr. *Irwin*. The whole amount set forth in the mortgage as the shares of *Tabb* and *Rogers*, had been previously advanced by them to *Walker*, and constituted an actual subsisting debt at the time. Mr. *Irwin* resided at *Green Bay*, and had, at different periods, forwarded drafts to Mr. *Walker*, in order to be vested in some productive fund, which Mr. *Walker* had converted to his own use. He continued subsequently to remit in the same manner, until the total of his credits with *Walker* was beyond the amount secured to him in the mortgage. It is contended, however, by the plaintiff, that he cannot claim from the mortgaged property more than the sum actually due to him at the time the mortgage was executed. I am of this opinion. If the mortgage had expressly stated that it was

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given to Mr. *Irwin* to secure future advances, and *Tabb* and *Rogers* had afterwards paid money and accepted of the same security, there would be some reason to hold them to their bargain, however unwise. If they chose to participate on equal terms in such a security, it would be their own folly. But it seems that they had actually paid their money. Mr. *Irwin* had not, as the plaintiff alleges.

“In equity, then, in these circumstances, they would have a prior claim upon the resources of their debtor. If the mortgaged premises, therefore, were insufficient to satisfy all the claims, I think Mr. *Irwin* ought to be postponed as to any monies he may have advanced subsequently to the date of the mortgage, the other mortgagees having no notice that it was intended to secure such further advances. The defendant contends, that ‘he is entitled to cover by the mortgage any sum advanced by him, before actual notice of the interests of the other mortgagees, which was subsequently to the receipt of the drafts.’ I do not think so. It was intended by *Walker* for the security of these creditors, by giving them a specific lien upon real estate. Their interest in the property (for the reimbursement of their money,) commenced with its date, and in case of a deficit in the proceeds, ought in equity to be adjusted according to the extent of their actual credits at the time. Having thus expressed our opinion upon the legal question presented, we have the fact to which it is referable for your decision: was the sum of three thousand dollars actually due from *Walker* to Mr. *Irwin* at the time the mortgage was given? By the books of Mr. *Walker*, it seems, that more than this amount is owing by him to Mr. *Irwin*.

“But, it is contended by the plaintiff, that one thousand four hundred and fifty dollars, then credited, were remitted in five drafts to Mr. *Walker* long subsequent to the date of the mortgage. On this subject there is some obscurity. The credit for this sum is given in Mr. *Walker*’s book on the 24th of *March*, 1820, which is prior to the mortgage. If this entry is correct, it would follow, that *Irwin* was really a creditor to the full amount of his share in the mortgage. Mr. *Walker* swears positively, that it was made at the time it purports, and that he had received, or expected to receive the amount. Some of the drafts had come to hand, others miscarried, but all at length were received and cashed. If the money had been remitted in that mode for the use of *Walker*, and at his request, I think the debt ought to be dated from the time they were forwarded by *Irwin*, and not from the time they were actually received. But if they were sent to *Walker*, as an agent, to vest for the use of *Irwin*, he would only be a debtor from the time they came to his hands.”

The jury gave a verdict for the plaintiff, and judgment was rendered thereon.

Ewing, for the plaintiff in error, cited 3 *Cra.* §9. 4 *Johns. Ch*

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65. 2 *Serg. & Rawle*, 138. 16 *Johns.* 135. 7 *Cra.* 31. 7 *Cra.* 34, 51. 5 *Binn.* 585. 2 *Vern.* 574. 2 *Vern.* 609. *Amb.* 439.

Kennedy, contra, referred to 5 *Conn. Rep.* 442. 4 *Conn. Rep.* 158. 5 *Johns. Ch.* 326. 2 *Kent's Comm.* 454.

The opinion of the court (HUSTON, J. dissenting,) was delivered by

GIBSON, C. J.—As against the mortgagor, the defendant below would undoubtedly be entitled to his whole debt. The sum at which it was fixed in the mortgage, is due at law; and chancery would relieve from it, only on doing complete justice by payment of whatever was received on the credit of the mortgage without regard to date. "It is only where the rights of third persons are prejudiced by want of notice," says Chancellor KENT, in *James v. Johnston*, (6 *Johns. Ch.* 429,) "that the extension of the security is prevented." And again, in *Brinkerhoff v. Marvin*, (5 *Johns. Ch.* 327,) "The limitation to this doctrine, I should think, would be, that when a subsequent judgment or mortgage intervened, further advances after that period, would not be covered." And in *Lyle v. Ducomb*, (5 *Binn.* 585,) Chief Justice TILGHMAN maintains the converse of the proposition, saying, that third persons, who cannot be prejudiced, have nothing to do with the transactions between the mortgagor and mortgagee. Let us see, then, whether the plaintiff has an equity distinct from that of the mortgagor, and superior to that of the defendant; for if it be only equal, the law must prevail.

The case is exactly this. To secure pre-existing debts, the debtor executes a mortgage to three creditors, who are not only absent, but ignorant of the whole transaction. The sum secured is eight thousand dollars, to be paid in the proportion of two thousand dollars to the last named mortgagee, and to the first and second three thousand dollars each. At the date of the mortgage, the second and third had advanced the amount of their respective claims, but the first had not: he has since, however, made up the deficiency by further advances. The fund derived from the mortgaged premises falls short; and the question is, whether the first named mortgagee is entitled to participate in proportion to the sum ostensibly due to him by the mortgage, or only in proportion to his advances at the date of it.

It is not disputed, that the mortgagor might have covered further advances, by a stipulation inserted in the mortgage. But it is said, the omission of it was a fraud on the second and third named creditors, who are supposed to stand in the relation of subsequent mortgagees. It is perfectly clear from the cases, that the office of such a stipulation is to give notice to third persons: consequently, no one can derive an equity from the absence of it but he who has been prejudiced by the want of it. In the first place, then, Mrs. Tabb, under whom the plaintiff claims, was not a subsequent mort-

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gagee, but the owner of an interest in common with the others, dan under the very same title. In the second, she did not become a party in consequence of being ignorant of any fact that lay more within the knowledge of the defendant than of her; for all were profoundly ignorant of the whole transaction. And in the third, she did not advance a shilling on the credit of the security, or give further time, or deliver up any preceding evidence of the debt. In *Petrie v. Clarke*, (11 Serg. & Rawle, 377,) it was held, that although the taking of a new security in discharge of the old debt, be a valuable consideration, the acceptance of a pledge unaccompanied with a stipulation for further time, is not. It is not easy to see, then, how she can have been prejudiced. It has been said, she would perhaps have refused to become a party to the mortgage, had she known it was intended to be a security for any thing that was not originally due. But the plaintiff may renounce the transaction now, and restore himself to the very situation in which Mrs. Tabb would have been, had she renounced it then. The mortgage was not offered to her on terms of giving further time, or cancelling any previous security, or doing any other act: it was purely gratuitous, and left her the right to pursue her claim as if it had never existed. She cannot have been defrauded by a transaction in which no right of hers was touched, nor any thing done but to benefit her. She, therefore, could derive no equity from want of notice, that can give the plaintiff a preference as a mortgagee.

But it is said, she may have been prevented from pursuing on her old security, by seeing the land apparently protected by this mortgage. That presents considerations which are distinct from those that arise out of her character of mortgagee. It must, perhaps, be conceded, that a mortgage to secure future advances, which does not contain notice of the agreement, is void against creditors generally, because the land is apparently covered for more than it actually owes, and pursuit might thus be eluded, when a knowledge of the true state of the facts would invigorate exertion, and render success certain. Had the plaintiff claimed as a general creditor, the mortgage might not have entitled the others to a preference. But, so far is he from having treated it as fraudulent, that *he has elected to claim under it*. Now, there is no rule of equity more universal in its application, or more just in its consequences, than that a party shall not claim in repugnant rights, and that he who takes the benefit shall also bear the burden. It would be an affectation of learning to cite authorities for this. The books are full of cases which show, that a party shall not contest the validity of an instrument from which he draws a benefit, or affirm it in part and disaffirm it in part. Here the plaintiff, or Mrs. Tabb, under whom he claims, might have repudiated the whole transaction, and stood on her former rights; but, claiming to participate in the benefit, she can be admitted only on the terms prescribed by the mortgagor: and the only subject of inquiry is as to the nature

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and extent of those terms. He had been in the practice of receiving periodical remittances from the defendant, which were continued for a considerable time after the execution of the mortgage; so that it cannot be doubted, that the debt specified in the mortgage was put at a sum beyond the amount of the advances then made, with a particular view to future remittances. Nor can it be believed, that the mortgagor would have preferred Mrs. *Tabb* at the expense of the general creditors, on any other terms than having her assent to the mortgage as a security for those remittances; and to withhold that assent now, would be a fraud on him. As against himself, and all others standing in his place, his right to make whatever disposition he pleased, will hardly be contested. In the creation of a trust, or other security, a debtor, not in failing circumstances, may give a preference even to a gift. Here it seems the mortgagor was, in fact, in failing circumstances, but as no gift was intended, there can be no presumption of fraud on that ground. But if there were, the plaintiff having made himself a party to the instrument, and claiming under the mortgagor, would be estopped from alleging it. It seems, therefore, the court erred in charging, that the defendant was not entitled to retain in proportion to the sum specified in the mortgage.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 23, 1828.]

GEARY and another *against* CUNNINGHAM.

IN ERROR.

After going to trial, and verdict, it seems, it is too late to object in error, that a statement has been filed instead of a declaration.

A statement may be filed in a suit on a recognisance of bail in error.

The omission of the date of such recognisance in the statement, is cured by verdict.

ERROR to the Court of Common Pleas of *Allegheny* county.

In the Court of Common Pleas of *Allegheny* county, at the suit of *P. Cunningham*, the defendant in error, against the plaintiffs in error, *Geary* and *Gray*, a summons issued in debt, two thousand dollars, *sur* recognisance to prosecute a writ of error with effect. A statement was filed and the cause arbitrated. An award was made against the defendants for one thousand one hundred and eighty-four dollars and eighty-nine cents.

The following was the statement filed by the plaintiffs. There were no other pleadings in the case:—

“A judgment had been obtained in the Court of Common Pleas of *Allegheny* county, by *Patrick Cunningham* against *Richard*

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Geary for one thousand and eighteen dollars and eighty-seven and a half cents. A writ of error was issued to this judgment by *R. Geary*, and *P. Geary* and *James Gray* were each bound in the sum of two thousand dollars, to prosecute the writ of error with effect, or pay the amount of the debt, interest, and costs, in case it was determined against the plaintiffs in error. The Supreme Court affirmed the judgment of the Court of Common Pleas, whereby *Richard Geary* and *James Gray* became liable to pay the amount of the judgment so affirmed, with interest and costs of suit. Wherefore suit is brought.

The plaintiff in error assigned for error, that the present case does not come within the act of the 21st of *March*, 1806, concerning statements, &c.; and if it does, the statement filed in this case is defective and insufficient, in not stating the amount which the plaintiff believed justly due to him, and in not stating the date of the recognisance on which suit is brought.

Burke, for the plaintiff in error.

Baldwin, *contra*.

The opinion of the court was delivered by

GIBSON, C. J.—It would be little creditable to the administration of the law, were exceptions like the present to prevail. A party lies by with his objection while a statement is filed in a cause perhaps proper for a declaration, and goes to trial before arbitrators, trusting to his chance of an award on that state of the pleadings: does not this amount to an agreement to waive exceptions, just as the acceptance of a short plea is a waiver of a plea in form? This principle of waiver was recognised in *Sauerman v. Weckerly*, at *Philadelphia*, in *December* last, (*Ante*, 116,) where it was held, that going to trial without plea or issue, and on a declaration containing blank spaces for dates and sums, was sufficient from which to imply an agreement to try on the merits. The defendant might have had the pleadings set right in the court below, and it is too late to object here, that a declaration ought to have been filed, or that the statement is informal. It is, however, by no means clear, that the statement was not the proper medium of setting forth the cause of action. A recognisance, with a condition for the payment of money, is in substance an obligation; and the condition here was a very simple one, to pay a liquidated sum on the happening of a particular event. I am satisfied our construction of the statement act has hitherto been too narrow. It is a remedial law, and to be construed liberally in advancement of the remedy. But the statement here is defective in omitting the date of the recognisance, that being a circumstance specially directed to be stated, by the terms of the act. But this, like other formal defects, is cured by the award, which is equivalent to a verdict. When a *title* appears on the pleadings, no matter how informally, an objection after verdict must not prevail.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 23, 1828.]

MARTIN and another, Executors of MARTIN, *against* FRY.

IN ERROR.

Testator, by his will, directs the funeral expenses and debts to be paid as soon as conveniently may be after his decease. He then gives his wife certain enumerated articles, such as a cow, side saddle, chest, &c., and the use of a house with its appurtenances, during widowhood. "I likewise give and bequeath to my said wife M., the one third part of my personal estate," all which legacies he declares to be in lieu of dower. He directs his executors, as soon as conveniently can be done, to hold a vendue, and sell all that part of his personal estate not heretofore or hereafter bequeathed to his wife or children, to the best advantage, causing the same to be appraised before the sale. He appointed an executor with power to sell his real estate: gave some specific legacies to his children, and the residue of his estate to be equally divided among all his children. *Held*, that the whole of the debts must be first paid out of the personal estate, and the one third of the remainder thereof passed by the will to the widow.

IN the Court of Common Pleas of *Venango* county, to which a writ of error issued, it was agreed that the following statement be submitted to the court for their decision, to be considered as a special verdict. The plaintiffs in error were defendants below.

On the 22nd of *August*, 1822, *Samuel Fry*, the testator, made his last will and testament, duly executed and registered, in which, after bequeathing a few small specific articles, and the use of a tenement in the said will mentioned, to *Mary Fry*, his wife, the plaintiff; bequeathed to her the one third of his personal estate. He appointed the defendants his executors, with power to dispose of his real estate and execute a deed or deeds to the purchasers. He then bequeathed to some of his children certain specified legacies; the residue of his estate to be equally divided among all his children. The amount of the personal property of the testator was six hundred and eighty-seven dollars and fifty-seven cents, (*prout* settlement of administration accounts, filed by the executors, passed by the register, and confirmed by the court,) the amount of the testator's debts was five hundred and sixty-four dollars and ninety cents, (*prout* same settlement, &c.) The executors sold the real estate for eleven hundred and forty dollars and seventy-five cents, (*prout* statement, &c.)

If the court shall be of opinion from the above stated facts, and a legal construction of the whole will, that the plaintiff is entitled to the third part of the whole personal estate, independent of the debts of the testator, then judgment to be entered for the plaintiff for two hundred and sixty-three dollars and fifty-six and a quarter cents.

If the court should be of opinion that the debts should be paid out of the aggregate of real and personal estate, and that the widow is entitled to one third of the personal residue, then judgment

(Martin and another, Executors of Martin, v. Fry.)

to be entered for the plaintiffs for one hundred and eighty-two dollars and nine cents.

If the court are of opinion that the debts were to be paid, entirely out of the personal estate, then judgment to be entered for only forty-three dollars, and thirty-eight cents.

The judgment in either case, to be *de bonis testatoris* only, unless the executors should render themselves personally liable.

The court below held, that the plaintiff, (the widow,) was entitled to the third of the personal estate exclusive of the debts, and therefore gave judgment for the plaintiff according to the case stated, for two hundred and sixty-three dollars and fifty-six and a quarter cents.

The will, after the usual preamble, was as follows:—

“And, as to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit:—first, I do order, and it is my will, that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be done after my decease. Item first, I give and bequeath to my dear wife *Mary*, one bed and bedstead, one cow; I also give and bequeath to her the use and occupation of the house wherein *Samuel Fry, jr.*, lived, with the stable, garden, and that part of the meadow that lay above the lane, during her widowhood, provided that she choose to inhabit and use the said house and tenement; otherwise she shall not be at liberty to rent it to any person whomsoever. *I likewise give and bequeath unto my said wife Mary, the one third part of my personal estate, all which legacies to my wife, I do hereby declare to be in lieu and stead of her dower at common law*, excluding her from all claims on any part of my real estate. I also give and bequeath unto her, one side saddle and one chest. *Item second, I do order and direct my hereinafter named executors or the survivors of them, as soon as conveniently can be after my decease, to have a vendue, and sell all that part of my personal estate not heretofore or hereafter bequeathed, either to my wife or children, to the best advantage, causing the same to be appraised before the sale.* I likewise order and direct the said hereinafter named executors, or the survivors of them, to sell and dispose of my real estate, to such person or persons, and for such price or prices, as may be honestly gotten for the same, with the restriction concerning the house and tenements bequeathed to my dear wife *Mary*, during her widowhood, for which purpose I do hereby empower my said executors or the survivors of them, to sign, seal, execute and acknowledge all such deed or deeds as may be required, and necessary for the granting and assuring the same to the purchaser or purchasers thereof; but in case that my hereinafter named executors should not soon find an opportunity to sell and convey my real estate, then it is my will that they should rent it to such person and for such conditions as may seem to them most to the benefit and interest of my heirs, until such time as they can sell and convey the same; and

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the monies arising from the sale of my real and personal estate, to be by my hereinafter named executors divided in the following manner, to wit:—*I give and bequeath to my son, Adam Fry, the sum of one hundred dollars, to be paid unto him out of the monies that shall first come into my executors' hands, after first discharging all my just debts.* I give and bequeath to my son, *Samuel Fry*, the sum of twenty dollars to be paid to him by my executors as soon as they can, after paying my son, *Adam Fry*. It is my will, and I do order, that my hereinafter named executors or the survivors of them, shall divide and distribute all the residue of the monies arising from the sale of my real and personal estate among all my children, sons and daughters, or the survivors of any of them, in the following manner, to wit: the monies arising from the sale of my personal estate shall be divided among all my children to equal share, including my sons *Adam Fry* and *Samuel Fry*, notwithstanding the *bequeath* made by me in their favour, as soon as it comes into the hands of my hereinafter named executors or the survivors of them; the monies arising from the sale of my real estate, when sold, shall be divided also among all my children to equal share, and paid in the following manner and condition, to wit: my son *Adam Fry* shall be the first to receive his share in full, as soon as the first monies of my real estate shall come into the hands of my executors or the survivors of them: all the rest of my children shall each receive one half of their shares only at a time, beginning first with my daughter *Eve*; second, *Barbara*; third, my son *Samuel*; fourth, *Madelina*; fifth, *Sarah*; sixth, *Christiana*; seventh, *Maria*. As soon as the last shall receive her half share, then it is my will that my daughter *Eve* shall receive her last half share, and then proceed on again as before until they shall all have received their last half share. Concerning my daughter *Christiana*, she being widow to the said *W. Moore*, deceased, and having several children to the said *Moore*, my will is, that her share when paid, shall be divided between her and her children, allowing her one equal share with her children, excepting one of her sons named *Samuel Moore*, to whom I bequeath ten dollars more than to the others. As concerning my daughter *Maria*, being married to *Joseph Cutygar*, and having as yet no issue, it is my will and I do order, that her share shall be paid to the said *Joseph Cutygar*, in the manner directed above, under the restriction that the said *Joseph Cutygar*, shall repay back unto my other children at the death of my said daughter *Maria*, in case that she leave no children, without interest, and only of what share shall fall to her of my real estate. As concerning my daughter *Madalina*, she being a widow to *George Keeper*, deceased, and having had several children to the said *Keeper*, and being now married to *John Cramer*, my will is, that her share be paid into the hands of the said *George Cramer*, as in trust for the children that she had to *George Keeper*, as well as for his own, he the said *John Cramer*

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giving security to the satisfaction of the *Orphan*, for the true performance of this clause. Lastly, I nominate *Henry Nelugh* and *Barnhart Martin* to be the executors of this my last will and testament; hereby revoking all other wills and testaments, legacies and bequests by me heretofore made, and declaring this to be my last will and testament and no other." Given under my hand and seal this 22nd of *August*, 1822."

Pearson, for the plaintiff in error.

Galbraith and *Ayres*, *contra*.

The opinion of the court was delivered by

ROGERS, J.—It is a general rule, that the personal estate is to be applied in the first place, to the payment of debts, and that the testator cannot, against his creditors, exempt the personal estate, although against his heir at law, or the devisee of his real estate, he may substitute the real, in the room of the personal fund, and charge his debts upon that fund which is not primarily liable. *Walker v. Johnson*, 2 *Atk.* 624. But to exempt his personal estate, and charge his real, there must be express words or a manifest intention. *Rostan et al. v. Rostan*, 2 *Yeates*, 63, 64, and the authorities there cited.

It is contended, and has been so ruled, that this intention is manifested in this will, and this forms the question on this writ of error. It is obvious, from an examination of the will, that the testator had no idea, that his real estate would be wanted for the payment of his debts. He seems to have been under the impression, that the two thirds of his personal estate would have been abundantly sufficient for that purpose, and had he been aware of the actual state of his affairs, it is probable he would have made a different provision. We are, however, called on to throw the debts on the devisee of the real estate, although the land is not expressly charged with the payment of debts, but on the contrary, is ordered to be sold and divided among certain of his children and grandchildren, who are particularly named. These devisees are as much the objects of the testator's bounty, as the widow. Their rights are as much to be favoured, and perhaps more so, as she might, if dissatisfied with the provision for her, have elected to have taken her dower at common law. The will directs the funeral expenses and debts to be paid as soon as conveniently may be after his decease. The testator then gives the widow certain enumerated articles, such as a cow, side saddle, and chest, &c., and the use of a house, with its appurtenances, during widowhood, and proceeds, "I likewise give and bequeath to my said wife *Mary*, the one third part of my personal estate," all which legacies, he declares to be in lieu of dower. He directs his executors, as soon as conveniently can be done, to hold a vendue and sell all that part of his personal estate not heretofore or hereafter bequeathed to his wife or children, to the best advantage, causing the same to be appraised before the sale. This,

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it is contended, is a specific devise of one third of the personal estate to the wife. The court are of opinion it is not, for the following reasons. The funeral expenses and the debts, are put by the testator on the same footing. They are to be first paid, and it is improbable that he intended a legacy to be of one third of the personal estate, exclusive of the expenses of his burial. Secondly, Because, from the whole tenour of the will, the intestate looks to the personal estate, and that alone, for the payment of his debts; and because he made a different disposition of his real estate, manifestly showing that he had no idea of charging that fund with the payment of the debts, and this differs the case from *Walker v. Jackson*, 2 *Atk.* 624, which was mainly relied on by the defendant in error. In *Walker v. Jackson*, the testator expressly charged his real estate with the payment of his debts, which furnishes a key to the decision, and reconciles it with the current of authorities. Besides, there were other circumstances relied on by the chancellor, which do not exist here, showing that he did not intend his personal estate to be brought in aid of the real fund. To show the plain intention of the testator to exempt the personal estate, the chancellor relies on the circumstance, that after giving several specific legacies, he says, lastly, I appoint the above-mentioned *Emma Marshal* and *Dorothy Beaupre*, joint executrixes of this my last will. If the testator had rested there, it was only making them executrixes, and the personal estate would then have been applicable to exonerate the real. But the testator some time after adds these words: "And I give and devise to them all my personal estate not hereinbefore devised," and in a formal manner re-executes his will. And this the chancellor notices, was made part of the probate, and is relied on as a strong, and indeed insurmountable circumstance to show the intention of the testator. Again, the doctrine contended for by the defendant in error, would make it the duty of the executors to set apart one third of the personal estate in specie, and make vendue of the remainder, which it would appear to me, was never contemplated by the executor.

When the testator orders his executors to sell all that part of his personal estate not heretofore or hereafter bequeathed to his wife and children, he has reference to the specific bequests. There is no necessity of including the devise of the one third of the personal estate to the will: the words of the will are all satisfied by referring them to those bequests which are actually to be specified.

Judgment of the court of Common Pleas reversed, and judgment for the plaintiff for forty-three dollars and thirty-eight cents.

[PITTSBURG, SEPTEMBER 23, 1828.]

MARTIN *against* MARTIN.

IN ERROR.

Verdict in ejectment "for the plaintiff one half of the survey, according to a draft signed by H. C., deputy surveyor, and filed in this case; the land to be laid off according to quantity and quality, reserving to M. M. (the defendant,) as much of the improvement as practicable, with six cents damages, and six cents costs:" *held bad.*

EJECTMENT by *William Martin*, against *Michael Martin*.

The defendant in error, was plaintiff below in ejectment for land thus described:—*A tract of land situated in Cranberry township in said county, containing two hundred acres, be the same more or less; adjoining lands of Robert Boggs, Esq., John Dunn, William Eakins, Jane Knox, and other lands of the plaintiff.*" The verdict was as follows: "*for the plaintiff, one half of the survey according to a draft signed by Hugh Conway, deputy surveyor, and filed in this case; the land to be laid off according to quantity and quality, reserving to Michael Martin as much of the improvement as practicable, with six cents damages and six cents costs.*" Upon this verdict the court below gave judgment.

Bredin, for the plaintiff in error, argued that the verdict was void for uncertainty: the judgment can never be carried into execution by the sheriff, without assuming a discretionary power, which the law does not give him, and which the jury cannot delegate.

Baldwin, contra, argued, that the parties being tenants in common, there is no fault in the verdict for which the judgment will be reversed. The plaintiff in ejectment may recover less than he sues for. At any rate, reserving to defendant below his improvements is no error that the defendant can complain of. This is equivalent to judgment *quod partitio fiat*: and the plaintiff below, being out of possession, his only remedy was by ejectment.

Some other questions were argued by the counsel on the merits, whether the plaintiff had shown a legal right to recover any part of the land. But they are omitted, being matters upon which, as there was no explicit statement of facts on the record, the court gave no opinion.

The opinion of the majority of the court was given by

Top, J.—A verdict, like an award, ought to have in it something final and conclusive. The wording of it must not be such as of itself to create disputes. An ejectment brought for land, describing it as in this verdict would be clearly wrong, because in case of re-

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covery the sheriff could not know how to deliver possession. Here the execution must follow the terms of the verdict, and be extremely puzzling to a mere executive officer. Had the jury said what half, what side, or what end of the tract, or by what lines it was to be laid off, and whether in one piece, or several pieces, so as to be equal in quantity with the residue of the tract, and had stopped there, some degree of certainty might have been attainable. But not only is the sheriff to take what part of the tract he pleases, (leaving as much of the improvement as practicable,) but he is to make an equal division according to *quantity* and *quality*: that is, as I understand the verdict, he who according to the ideas of the sheriff gets the poorest land must have so much more of it, as to make it equal in value to the other share. Of all these matters the sheriff must, of necessity, be sole judge, and the appeal from his supposed mistake or partiality, must be by a new ejectment. Besides, who will say from this verdict whether it was the jury's intention that the improvements of *Michael* should be considered in the estimate of value or not? that is, whether they intended to give to *William* half of the avails of *Michael's* labour, as well as half of the land? It would be clearly useless, and worse than useless, to reserve the improvements as far as practicable, if they did not intend that the improvements should also be excepted in estimating the value. Yet the words are positive to lay off the half to *William* according to quantity and quality.

It was said at the bar that the verdict may be sustained by inferring the parties to have been tenants in common of the land: and thus the reservation of the improvements was a favour, and not a thing of which the plaintiff in error has any right to complain. There is no intimation of this in the verdict. At any rate, I would deny the power of a jury to make a distinction as to title between a man's woodland and his cleared fields, belonging to the same farm, except for some very manifest reason. There appears to me hardship in the very idea of giving all the clearings to one, and all the woods to another, and thus spoiling the whole. It is not by any means certain that the jury intended to give *William* the benefit of *Michael's* labour. But one thing appears certain, that a writ of ejectment cannot be legally substituted for a writ of partition; nor a sheriff put in place of a jury. To execute a partition the law requires sureties and bonds, and a jury upon the ground, after an express judgment of the court to that effect. Even after such judgment, the act of assembly gives a jury no power to spoil a farm by dividing it. If not to be parted without damage, they are to value the whole undivided. I am of opinion that the judgment be reversed.

HUSTON, J.—The only error relied on, is a supposed defect, or illegality in the verdict, and judgment on it. It is in these words: "We find for the plaintiff one half of the survey, according to a

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draft signed by *Hugh Conway*, deputy surveyor, and filed in this case; and the land to be laid off according to quantity and quality, reserving to *Michael Martin* as much of the improvements as practicable." This verdict, though not expressed in the clearest possible form, is perfectly intelligible. One half of the land to be laid off according to quantity and quality, is equivalent to saying an undivided half: it clearly means that—and without straining cannot mean any thing else—"according to a draft signed by *Hugh Conway* and filed in this case." This reference makes this draft a part of the verdict and of the record. We have so many verdicts in these words, and such verdicts have been so often sanctioned by this court in cases not reported and reported, that I consider it not disputable. A report of referees, finding for the plaintiff, according to the decision of the board of property, was held good in this court. "Reserving to *Michael Martin* as much of the improvements as practicable," cannot be misunderstood: it is equivalent to saying that the improvements of *Michael Martin* shall be in the half allotted to *Michael*.

Where two hold land in partnership, a writ of partition is the mode of compelling a division; but if one of them has ousted the other and has the sole possession, it is necessary for him who is ousted to bring an ejectment to recover the possession, before a writ of partition can issue. The recovery of the actual or at least legal possession, is necessary to commence the proceeding in partition. This carried so far in *England*, that in a proceeding for partition in chancery, if a defendant denies the possession of the plaintiff, the bill will be dismissed, or in some cases retained till the plaintiff recover possession at law. *Bunbury*, 322. 1 *Com. Dig.* 733, *Chan. E.* 4. 1 *Johns. Ch.* 111. Though, if the titles are equitable, and the title of plaintiff, not the possession, is denied, chancery will decide on the title. 2 *Atk.* 380. 4 *Johns. Ch.* 271, *note*.

The jury in ejectment cannot divide the land, and find for the plaintiff his portion in severalty. Can they find that one of the parties is to have his share allotted, so as to include a certain part of the premises? I hold they can. This could be—nay, must be, done at common law. In some cases, a father advances one of his daughters, by giving her a part of his lands, and dies; the other parcener brings a writ of partition, the advanced daughter puts the part she has received into hotchpot. In the partition this part allotted to her must be included in her share, and so much added to it as will make her part equal to the other sister.—*Co. Litt.* 177, *sect.* 268. *Com. Dig. Title Parcener, C.* 4. This before chancery had interfered in partition. Almost all partitions are now made in chancery, and it has long been there established, that every parcel of the estate need not be divided; it is sufficient if each parcener or tenant in common, have what is an equal proportion of the whole. 1 *P. Wms.* 446. This is recognised in our acts, by the

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fourth section of our intestate act. If the intestate leaves a widow, and no children, the widow is to have one half of the real estate, including the mansion house, during her life. The jury and sheriff then must make the partition, if the land can be divided, so as to include the mansion house in the widow's part, and the writ to the sheriff in most counties directs him in this way, and it ought so to direct him in all counties. If it is said that the Orphans' Court have chancery powers, I answer, the case put above proves it to be a common law power; and, further, that in this state the Common Pleas have by our acts of assembly chancery powers in partition. At common law the plaintiff in partition must make title to the part declared on, or he fails; by our act the court must "examine the plaintiff's title, and the quantity of his part, or purpart; and accordingly as they shall find his part or purpart to be, give judgment, and award a writ to make partition, whereby such proportion, or purpart shall be set out in severalty." Where the defendant appears and pleads, and the facts of interest in the plaintiff, or possession are disputed, the court generally directs an issue, and these are settled by a jury, and I think this ought always to be done in such cases. But if the defendant does not appear, the court must examine the title, and give the judgment; and by the very words of the law this judgment may be different from the plaintiff's claim in his writ. But must it be a judgment that the plaintiff recover one half, or one fourth, as the case may be; or may it be, and must it be in some cases, that a certain part of the premises be included in the purpart of some one of the co-tenants? Heirs may still, where they are of age, or where one of them has sold, bring partition in the Court of Common Pleas, and there the judgment must be special; that is, that the part given one child in advancement, or the mansion-house, if widow and no children, be included in the purpart, where, by law, it must be. And why not the same in all cases where justice and the rights of the parties require it?

There are many hundred executory agreements in this state, by which the owner of lands has agreed to give to a person, for example, one hundred acres, to be laid off so as to include his improvements, provided he moves on the land, builds, clears, and cultivates for a specified number of years. Deeds are never made in the first instance, because the right is only to accrue on complying with the agreement. These agreements are perfectly legal, no reason can be given why they should not be carried into effect. Suppose one of these settlers having complied, the land owner and he cannot agree as to how, or where the division is to be made, and a writ of partition is brought, (the only writ which can be brought where each acknowledges the right and the possession of the other,) will the court award a writ to make partition, so as to give the settler one half or one-fourth generally, or to give it so as to include his improvements,—in the words of the act of assembly, "give judgment according as they shall find his right to be?"

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The equity powers of our courts are not defined; we have not been backward in assuming them where justice requires the exercise of such power, and it is among the best parts of our administration of justice. Shall we refuse or reject it when expressly given? But the difficulty often is, that in *England* the judgment is general; and the forms of the common law impede us at every step. Be it so. Still we have altered these in many cases; and, where the power requiring us to do so is expressly given, I can see no objection to adapting the form of the judgment to the execution of the power.

If it is said this is an ejectment, and not a writ of partition, I answer, that in ejectment we exercise more extensive equity powers than in any other form of action; and we have a great number of verdicts in ejectment perfectly good here, which would not be so in a court where there is a chancellor in the other end of the hall. And further, I would consider this the first step towards a partition of the tract in question. If the verdict and judgment here was for an undivided half, it would seem to stand in the way of a division giving one his share to include his improvements; it would leave something to be got over in the succeeding stages of the cause. But I may be told, we have before us no agreement of the parties, showing why the jury were of opinion, that *Michael's* part should include his improvements, or so much of them as is practicable. The answer is easy: the plaintiff has brought no part of the record before us but the charge of the court, and the verdict and judgment. We have a right to take it this was, because bringing more would not be for his advantage, because the facts stated, are as favourable as he could expect. And as a general rule, I would support a charge, or a verdict and judgment, brought up in such way, if I could suppose any state of facts which would make them good. Such is the course of the courts in other countries, and reason and experience say such is right to be the answer here. We have no right to presume this verdict was so given without reason or against reason, we are bound to suppose it given on proof which justified it. The rule is as familiar as any other, that after a verdict every thing shall be presumed to have been proved, which was necessary to entitle the party to recover. But there is to my mind an additional reason for supporting this judgment, it is palpable that this latter clause of the verdict was put in for the benefit of the defendant below, and in consequence of proof adduced by him. I would not permit a party in any case to reverse a judgment which can be carried into effect, and I think I have shown this could be, because of any thing which is for his own benefit. If he says this is not for his benefit, the plaintiff does not insist on it, does not want it. I would then strike it off as surplusage; the verdict is complete without it, but I would not reverse.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 23, 1828.]

DUNCAN *against* HARRIS and another.

IN ERROR.

As respects third persons, a levy on personal property is a satisfaction to the plaintiff; but, as between the plaintiff and defendant, if the plaintiff has released such levy, the judgment not being paid, it is no satisfaction.

To relieve against an execution unduly issued in the court below, application should, in the first instance, be made there: but, if enough appear on the record to decide the dispute, the Supreme Court will determine it on writ of error.

ERROR to the Court of Common Pleas of *Westmoreland* county.

Harris and *Donaldson*, the defendants in error, were plaintiffs below.

This writ of error was taken for the purpose of setting aside an execution, issued at the instance of the defendants in error against the plaintiff in error, returnable to *May* term, 1828. The writ of execution issued on the 20th of *April*, and the writ of error on the 25th of *April*, 1828.

The judgment against the plaintiff in error was entered by virtue of a power of attorney, and is not now the subject of controversy. It was entered as of *August* term, 1817. To *February* term, 1818, a writ of *fiери facias* issued on this judgment, and a levy was made on real estate, an inquisition held, and the property condemned. A writ of *venditioni exponas* was taken out to *May* term, 1818, and on the 19th of *May*, 1818, on motion and affidavit filed, the sale was suspended until the further order of the court.

On the 3d of *March*, 1820, on motion of the plaintiff's attorney, the order was discharged, and leave given the plaintiff to take out a new execution. "The property mentioned in this writ having been sold on a prior judgment, and the monies arising from the sale not reaching this."

A *fiери facias* was issued to *May* term, 1820, which was returned *nulla bona*.

A *testatum fiери facias* to the sheriff of *Allegheny* county, returnable to *August* term, 1820, was issued, and returned *nulla bona*.

To *February* term, 1823, a *fiери facias, post testatum fiери facias* was issued. The return on the docket is entered as follows:—"Levy made on personal property, which was afterwards given up on the levy being released by Mr. *Armstrong*, one of the plaintiff's attorneys. So answers

"*John Nicholls*, sheriff."

This writ is endorsed with "mileage and levy, three dollars and twenty-four cents. Levy made on personal property, which was afterwards given up on the levy being released by Mr. *Armstrong*, one of the plaintiff's attorneys. So answers

"*John Nicholls*, sheriff."

(Duncan v. Harris and another.)

This writ is also thus endorsed:—"Monday, 25th of November, 1822, at nine of the clock in the morning, this writ came to my hands, *John Nicholls*, sheriff. By virtue of the within *feri facias*, I have levied on all the right, title, interest, and claim of, in, and to a certain lot of hogs, containing two hundred, more or less, of *James Duncan*.

"George Singer, deputy sheriff.

"November 26th, 1822."

In the hand-writing of the plaintiff's attorney:—

"I, as the attorney of the plaintiff, did direct the sheriff to return the execution not to be executed before the return-day thereof. And I now authorize the same.

"George Armstrong.

"23d of February, 1824."

To *August* term, 1827, a writ of *capias ad satisfaciendum* was issued, to which the sheriff returned *C. C.* and *committitur*, and the defendant was subsequently discharged from custody on *habeas corpus*.

A *testatum* writ of execution was issued to the sheriff of *Bradford* county, returnable to *May* term, 1828.

To reverse this writ of execution, the present writ of error has been issued out.

The affidavit filed on the 19th of *May*, 1818, was as follows:—

James Duncan, the defendant, being sworn, deposeth and saith, that at the court in *Kittanning* last fall, Mr. *Armstrong* asked this deponent to assign over to *Harris* and *Donaldson* a receipt of *Thomas Blair*, for notes left in his possession for collection, on *J.* and *S. Latshaw*, and guarantied by *Adam Johnston* to the amount of upwards of one thousand dollars. And the said *Harris* and *Donaldson* were to prosecute, or cause to be prosecuted, the said notes to judgment and recovery. And when the money should be collected, it was to be applied to the payment of the above judgment. That suit had been brought on said notes in *Armstrong* county for the use of the said *Harris* and *Donaldson*, and this deponent has no doubt it will be collected. This deponent further saith, that he sold a tract of land in *Indiana* county to *George Armstrong*, Esq. for one thousand dollars. That by agreement Mr. *Armstrong* retained five hundred dollars, to be applied to the payment of judgments of record against the said *James Duncan*, and that all the judgments in *Indiana* county, except one due to *Matthew Jack* of about six hundred and twenty dollars, which were liens against the land sold to Mr. *Armstrong*, have been paid off.

The plaintiff in error prays, that the *testatum* writ of *feri facias*, issued to the sheriff of *Bedford* county, may be reversed and set aside, because the judgment was satisfied by the levy made on a lot of two hundred hogs, by virtue of the execution returnable to *February* term, 1823.

Alexander, for the plaintiff in error.—The question is, whether,

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if goods are levied and returned by the sheriff, and there is a release of the levy by the plaintiff's attorney, this is a satisfaction of the judgment. Execution once executed, is a satisfaction of the debt, even though the property be rescued, just as if the body were taken in execution. 12 *Serg. & Rawle*, 40. *L. Raym.* 1072. 4 *Mass.* 402. 7 *Johns.* 429. 1 *Keb.* 551. 12 *Johns.* 208. Where the defendant is taken on a *capias ad satisfaciendum*, and discharged on agreement, he cannot again be taken on the same judgment. 4 *Burr.* 2482. 4 *Dall.* 215. *Barnes' Notes*, 205. 5 *Johns.* 364. 3 *Saund.* 344.

Coulter, contra.—I admit that execution executed is satisfaction, but a mere levy is not execution, unless it produce actual satisfaction.

The opinion of the court was delivered by

ROGERS, J.—I agree with the counsel for the defendant in error, that a motion should have been made in the Court of Common Pleas, to set aside the *testatum fieri facias*, instead of coming into this court for relief, in the first instance, by writ of error. The Court of Common Pleas could have inquired into the transaction in relation to the release of the execution and return of the sheriff, which the Supreme Court are in general precluded from doing. Enough, however, appears to satisfy us, that the plaintiff's exception cannot be sustained. There is no doubt of the general rule in relation to such returns, as between third persons, which are uniformly held to be an extinguishment of the debt. That is not this case; for the present is an attempt by the defendant himself, to have the benefit of the rule, when it is manifest the debt has not been paid. The hogs were levied on by the sheriff, and were released, for what cause does not, nor is it necessary to appear, by the plaintiff's attorney, with directions, that the writ should not be executed. The property never went to the use of the plaintiff, but was returned to the defendant. It would be a strange perversion of a principle to convert such a transaction into a satisfaction of the debt.

Execution affirmed.

[PITTSBURG, SEPTEMBER 23, 1828.]

WILEY and another *against* MOOR and another.

IN ERROR.

The obligors wrote their names, and affixed their seals to a piece of paper, and left it with the judge of the court with instructions to fill it up as a bond, conditioned to take the benefit of the insolvent act, which was accordingly done: *held*, that the bond was valid and binding on the parties.

WRIT of error to the Court of Common Pleas of *Beaver* county, where judgment was rendered in favour of the defendants below, who were defendants in error.

(Wiley and another v. Moor and another.)

The plaintiffs *Wiley* and *Earl*, brought this action before a justice of the peace, of debt on bond against *Moor* and *Thompson*, and it came by appeal into the Court of Common Pleas. The suit was on an obligation in the sum of one hundred dollars, executed by *Moor* and *Thompson* to the plaintiffs, conditioned for *Moor's* appearance to take the benefit of the insolvent laws, to which the defendants pleaded *non est factum*, and payment.

It appeared in evidence, that *Moor* being in custody under an execution issued by a justice of the peace, at the suit of the plaintiffs, for the sum of fifty dollars and fifty cents, and costs of suit, applied to Judge DRENNAN to give bond and receive a discharge; and for that purpose the defendants wrote their names on a blank bond, or piece of paper, and affixed their seals, and left it with Judge DRENNAN, desiring him to fill it up. He gave the discharge, and took away the bond, and afterwards filled it up according to their instructions.

The president of the court below charged the jury, that when a deed has been acknowledged before a magistrate, appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration. The insolvent law provides, that the defendant may give bond to the plaintiff, with such security as may be approved of by the judge. When the bond has been approved of, any alteration made in it renders it void; if it had passed into the hands of the plaintiffs, they could not have altered it. The judge in whose possession it remained has completed his duty when he has approved of the security and discharged the prisoner: he cannot then exercise a ministerial power in relation to the bond, any more than a third person could, into whose hands the bond may have fallen.

Watson, for the plaintiffs in error, cited 6 *Serg. & Rawle*, 14. 13 *Serg. & Rawle*, 213. 14 *Serg. & Rawle*, 423.

Watts, contra, cited, 1 *Pet.* 47. 13 *Serg. & Rawle*, 190. 14 *Serg. & Rawle*, 380. 2 *Stark. Ev.* 456. 1 *Dall.* 67.

The opinion of the court was delivered by

ROGERS, J.—The ancient principle, *Shep. Touchs.* 54. *Perk. Sect.* 118, and *Co. Lit.* 171, “that if a man seal and deliver an empty piece of paper, or parchment, albeit, he do therein withal give commandment, that an obligation, or other matter shall be written in it, and this be done accordingly, yet this is no good deed,” has been overruled in the more modern cases. The point came before the Court of King’s Bench, in *Texira v. Evans*, cited and relied on in *Master v. Miller*, 1 *Anstruth*, 229. The case occurred before Lord MANSFIELD, and was this: *Evans* wanted to borrow four hundred pounds, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bonds;

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Texira lent two hundred pounds on it, and the agent accordingly filled up the blanks with that sum and *Texira's* name, and delivered the bond to him. On *non est factum* pleaded, Lord MANSFIELD held it a good deed. The same point came before the Supreme Court of *Pennsylvania*, in *Sigfreid v. Levan*, 6 Serg. & Rawle, 308. The plea was *non est factum*; and, on objection to the deed, it was admitted in evidence, and finally, a verdict was given for the plaintiff. Although the question was not directly decided, as it arises on the admissibility of the evidence, yet it may be collected from the case, that the opinion of the court was in conformity to the case of *Texira v. Evans*. Judge DUNCAN enters into an elaborate review of the authorities, although *Texira v. Evans* seems to have escaped his attention. In delivering the opinion, he says, "I would consider him (that is, *Peter Levan*, who filled up the bond,) as the agent of the defendants, at least, I would so leave it to the jury; and if he is so considered, then he delivered the bond to the plaintiff, having authority so to do, and it would be their deed." The obligors wrote their names, and affixed their seals to a piece of paper, and agreed that Judge DRENNAN should fill up the bond, which was accordingly done. It is part of the case, that the instructions were faithfully fulfilled, nor is there any pretence, that after the bond was completed, any alteration was made in it. It is an ungracious defence on the part of the defendants, who do not allege any mistake of the instructions, or any fraud, but seek to take advantage of a technical principle to defeat a just debt. To hold that this comes within the principle, "That where a deed has been acknowledged before a magistrate appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration," is a misapplication of the principle. Judge DRENNAN stands in the situation, not only of a magistrate, but an agent. The deed was complete only when filled up according to his instructions. The delivery and acknowledgment take effect from that time, and it is not pretended, that any alteration was made after the completion of the deed. This is nothing more than the application to a sealed instrument, of a practice which has been repeatedly recognised in relation to promissory notes and bills of exchange. There is as much danger from the one as the other, and in the absence of mistake, it is so far from being productive, that it is a prevention of fraud. My attention has been called to the case of *Harrison v. Tiernans*, 4 Rand., in which it was held, "That a bail bond, which was returned to the clerk's office, but which specifies no sum to be paid by the obligor to the obligee, is a mere nullity." The reason which is assigned, is perfectly satisfactory: "That a bond is a deed, whereby the obligor obliges himself to pay a certain sum of money to another at a day appointed. That the obligation to pay money is of the essence of a bond, and is in fact the only stipulation which the bond contains." The distinction taken by the judge,

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between a bill of exchange and a bond unnecessary to the decision of the main point, and is not borne out to its fullest extent by authority. It is in opposition to *Trainer v. Evans*, and *Sigfried v. Levan*; and, however respectable as a *dictum*, it is not sufficient to overrule adjudged cases.

Judgment reversed, and a *venire facias de novo* awarded.

[PITTSBURG, SEPTEMBER 23, 1828.]

CASKEY *against* BREWER.

IN ERROR.

Devise to testator's daughter C., her heirs and assigns. Another devise to testator's daughters S. and M. respectively, and their respective heirs and assigns. If either of them died without issue, that then the share of the said daughter should vest in the other two if living, or in the daughters' surviving children, &c. *Held*, that S. took an estate tail, with remainder in fee to her sisters or their children.

WRIT of error to the Court of Common Pleas of *Allegheny* county, brought by *Joseph Caskey*, the plaintiff in error and plaintiff below, against *Charles Brewer*. The defendant pleaded covenants performed.

The following case was stated for the opinion of the court, to be considered in the nature of a special verdict.

W. Cecil, in his lifetime, was seised, in fee, *inter alia*, of a lot of ground in *Pittsburg*, marked in the plan thereof No. 116, on which he resided. On the 10th of *January*, 1812, he made his will, containing among other things, the following devises:—

"I devise to my daughter *Charlotte Sophia*, my dwelling-house, together with twenty-five feet of the lot on which it stands, bounded by the alley and extending along the same from *Liberty* to *Penn* streets, preserving the same breadth of twenty-five feet throughout, subject to the life estate of his mother, to have and to hold the same to her, her heirs and assigns for ever. I likewise devise to her one undivided third part of my above-mentioned tract of land on *Ginter's* run, subject to the life estate of her mother, aforesaid, to have and to hold the same to her, her heirs and assigns for ever. *Thirdly*, I devise to my daughters, *Susanna* and *Maria*, the residue of the lot on which I live, to be equally divided in front on *Liberty* and *Penn* streets, and the share of each extending throughout from one of the said streets to the other. The part in the middle, adjoining to my dwelling-house, to belong to *Susanna*, and the part next to *Enoch* and *McCormick*, to belong to *Maria* in severalty, subject to the life estate of their mother, to have and to hold them respec-

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tively, and to their respective heirs and assigns for ever. I also devise to my daughters, *Susanna* and *Maria*, each one undivided third part of my land and plantation on *Gintler's* run, aforesaid, to be held by them in common with their sister, *Charlotte Sophia*, subject to the life estate of their mother, to have and to hold the same to them, their heirs and assigns for ever. *Fourthly*, it is my will, that if either of my said three daughters should die without issue, that then the share of said daughter shall go and vest in the other two daughters if living, or in the daughter surviving and the children, if any, of the deceased daughter. And if two of my daughters die without issue, the third living, that then the survivor shall take the share of both the deceased; or, if any of my daughters die leaving children, the said children to take the same estate as their mother would have done had she been alive."

W. Cecil died shortly after the execution of his will, which was duly proved and recorded, and his widow died several years ago. On the 20th of *February*, 1827, *Susanna Cecil*, deeming herself seised of an estate tail in the premises mentioned in the foregoing devise to her, for the purpose of barring and defeating the said estate, by her deed framed pursuant to the directions of the act of assembly for barring estates tail, granted and conveyed to *Maria Brewer*, late *Maria Cecil*, and her heirs in fee simple, that portion of the lot No. 116, devised to the said *Susanna*, and the deed of conveyance was duly entered on the record of the court of Common Pleas, &c.

On the 4th of *April*, 1827, *Charles Brewer* and *Maria*, his wife, late *Maria Cecil*, by their deed acknowledged agreeably to the form provided by act of assembly in cases of the transfer of estates of females coverts, granted and conveyed to *Joseph Caskey* in fee simple, that part of the lot No. 116, devised to the said *Susanna*, and the deed last mentioned contained a covenant, that the said *Maria*, at the date thereof, was seised of an indefeasible estate in fee simple in the premises granted, and that the said *Charles* and *Maria* had good right and lawful authority to grant and convey the same in fee. The plaintiff alleged a breach of this covenant.

The court below entered judgment for the defendant.

The error assigned was, that by the devise mentioned in the case stated, *Susanna Cecil* took an estate by executory devise, and not an estate tail that could be barred under the act of assembly for barring entails, and judgment should therefore have been entered for the plaintiff.

The opinion of the court was delivered by

HUSTON, J.—The question arises on this clause of the will. The testator, after having devised to his daughters, *Susanna* and *Maria*, a part of a lot in *Pittsburg*, particularly described, to have and to hold the same to them respectively, and to their respective

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heirs and assigns for ever, and then some other devises, in nearly the same words, proceeds:—" *Fourthly*. It is my will that if either of my said three daughters should die without issue, that then the share of the said daughter shall go and vest in the other two daughters if living, or in the daughter surviving, and the children of any of the deceased daughters; and if two of my daughters die without issue, the third living, that then the survivor take the share of both the deceased: or, if any of my daughters die leaving children, the said children to take the same estate as their mother would have taken had she been alive."

Cases on similar wills are very numerous, and are to be found all collected in so many different reports and digests, that I shall not add another compilation to the list. See *Powell's Fearn*, 118, 179, 180, *et seq.* 8 *Mass. Rep.* 3. The general tenour of these cases is the same in *England*, from whence our ancestors brought with them the general system of our laws in the neighbouring states and in this state. *New York* seems to form, for the last twenty years, an exception. There will, on examination, be found a few scattered cases, which look like exceptions. In some few instances, the very judges who make these decisions, have overruled them; in others, it has been left to their successors. An anxiety to effect the intention of the testator, has been the ground of any variation in the decisions, and perhaps it may be questioned, whether this has been the event always attained by such variance. The fact is, the testator would seem, in most cases of this kind, not to have contemplated every possible combination of events which might occur after his death, and of course not to have provided precisely for them. At one time I acknowledge I had become convinced, that whatever might be the case in *England*, the construction settled here, "that a devise to one and his heirs, and if he died without issue, then over," was an estate tail, was clearly wrong; for that if the devisee had children, it would go to the eldest son, which, in this state, is perhaps never contemplated by the testator. And I still believe, that in the event of the devisee having children, this construction which I consider settled in this state, produces an effect contrary to the intention of the testator in the respect mentioned, almost invariably. But, I think it ought not to induce this court to change the current of decisions, because it might, and no doubt would, occasion much contest and unsettle many estates now in peace, and which, from family partitions and sales to ancient purchasers, ought not to be disturbed. The legislature can introduce a new law to operate prospectively. I do not know that we could.

Because, I am not sure a construction, that this and similar devises, were conditional fees in all cases, and the devise over an executory devise, would, in all or in most cases, effect the intention of the testator. Let us see the effect this would have during the life of the devisee. Suppose a case, which is no fiction:—two of

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the daughters married, and with large families; a third unmarried, and that third had attained an age which renders it certain she will never have children; that their ancestor devised to them, by similar words as in this will, a large estate, but consisting entirely of vacant lots in *Philadelphia*, and back lands, which produce nothing, but which every year call for much money to pay taxes. The unmarried daughters have now, in effect only, a life estate; they cannot improve or lease to those who will improve, for the lease must expire and the improvement go over at their death; the unmarried daughters are thus left without any provision, and must continue so if they live to the ages of fourscore; and this, certainly, their father never intended. The same effect will, for a time, be produced when a devise of this kind is given to a child of a year old, especially if of tender health and not likely to attain maturity, and the property devised not productive.

Because, the construction settled, goes as near the intent of the testator as any one we could devise, and therefore ought to remain untouched. What is that intention? This is always to be ascertained to a certain extent, though what the testator would have directed, if certain events had been foreseen, is, at best, conjecture. The general intent is to give to the child an estate of inheritance, but one which must go to the children of the devisee, and which yet cannot be sold or bequeathed by the devisee, the remainder of which, if the devisee has no children, the first testator directs to go in a certain way. Now, this is the very description of an estate tail, no more liable to be mistaken than the strict legal definition of one; but an estate tail may be changed into a fee simple by common recovery, or in this state by conveyance in the prescribed form; and if this is done, the remainder is gone to be sure, but the child is supported,—is not left to depend on charity, or to starve.

If it is not questioned, and I believe it cannot be, that this devise created an estate tail in *Susanna*, provided the words "die without issue," mean an indefinite failure of issue: then the devise is a perfectly legal one, an estate in fee tail, remainder over to her sisters or their children. If we could ask her father now, whether he intended, if she should live unmarried till the age of one hundred, the lot is to remain unimproved and unproductive, and she to depend on her labour, or on her sisters, or on the charity of strangers, I have no doubt what would be his answer; and that answer would be, that he meant it as an estate available for her support. I can find nothing here which goes to contradict this; but, I have said, an estate tail cannot be so restrained, that tenant in tail cannot change it to a fee. Many a man wished it unchangeable, and that the land he left might be conferred to his posterity for ever. The *British* parliament attempted it, but in vain. The remainder men in tail will always complain. Once in a century a judge will be found to persuade himself to join the cry. Public convenience required, and public opinion has sanctioned the device, which ren-

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dered estates tail alienable, and I am now satisfied, that public convenience occasioned and has justified the construction put on the words, "dying without issue," or "dying without leaving issue;" and that however the case may be after the death of the devisee, it would in most, if not in all cases, thwart the will of the testator during the life of the first devisee, to construe those words in the way sometimes contended for.

I am of opinion, that the estate devised, was an estate tail in *Susanna*, with remainder in fee to her sisters or their children: the case states a conveyance in due form, to bar the entailment; the deed then conveyed an estate in fee, and *Charles Brewer* and wife, have not broken their covenant. And the judgment of the Court of Common Pleas is affirmed.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 23, 1828.]

M'CULLY *against* BARR.

APPEAL.

Evidence is not admissible in ejectment, in which the question is as to the validity of a will, of testimony or admissions in a suit brought between other parties, although the question is the same.

A letter, purporting to be an answer to one written by the testator, is not evidence to show the contents of the supposed letter of the testator.

It is not a ground to grant a new trial in a question on the capacity of a testator, that the judge refused to let certain accounts and receipts, produced in evidence, to be taken out by the jury, though it ought regularly to have been permitted.

APPEAL from the decision of HUSTON, J., holding a Circuit Court in *Pittsburg*.

This case was as follows:—The late Captain *N. Irish* of *Pittsburg*, made a will in 1809; on the death of a son he made another will, dated in 1813, and regularly cancelled the first. Both these papers were entirely in the hand-writing of the testator, and it was under the latter (which was admitted to be his will, unless a subsequent paper, dated the 7th of *November*, 1814, was a valid will,) the plaintiff claimed a house and lot, for which this suit was brought.

The evidence disclosed, that in *February*, 1814, Captain *Irish* had a paralytic stroke, which confined him for some time. One witness (his widow,) proved, that his mind was affected from the time of his attack, in such a way as to render him incapable of attending to his business. In *October* following, he had a second attack of the same kind. The precise date of this latter attack was not proved, but it was during the session of the presbyterian synod

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in *Pittsburg*: that session commenced on the second Tuesday of *October*, 1814, and lasted about two weeks.

Many witnesses were examined for the plaintiff, and all of them except Mrs. *Irish*, above-mentioned, proved, that after the first attack, and through the summer of 1814, Captain *Irish* was capable of some attention, at least, to business, and more than one, that he was capable of attending to his ordinary business; but they all proved, that after the second attack, his mind was almost totally destroyed; that he did no business; entered into no conversation; frequently did not appear to know those who had been his most intimate acquaintances; often did not attend to, or answer questions; that he could not engage in conversation so as to answer any question beyond yes or no; would weep or laugh in short succession without any visible cause for either. The defendant, who claimed under *William B. Irish*, a son, called witnesses to prove his capacity during the summer of 1814, and one who proved it in the succeeding year.

The will of the 7th of *November*, 1814, was proved as follows:—*L. Stewart* being sworn, on looking at the paper said, "I wrote this paper at the request of *William B. Irish*. I don't recollect seeing the old gentleman on the subject. No other person than *William* spoke to me about it. I gave it to *William*. He gave me the substance either in writing or verbally, and I wrote it down." Repeated, that he did not remember whether he gave a memorandum in writing, or took one from his instructions. *William* paid him for writing it. Did not charge Captain *Irish*. On a cross-examination, adhered to the above, and could not be more particular.

The defendant also produced the books of Captain *Irish*, in which there were entries of his renewal as endorser of a note in *April*, *June*, and *August*, and all correctly made; also, entries of rents due him, of monies paid him, and of articles sold during the summer of 1814, in the defendant's accounts, of about thirty persons. In three or more of these accounts, were entries after the time of the second paralytic attack, about which there was some dispute, submitted to the jury; also, several of these accounts were copied off from the books, and two receipts, both dated in the early part of the summer of 1814, were produced, in the hand-writing of Captain *Irish*.

The proof of the execution of the will of 1814, was as follows:—*R. T.*, a witness to the will, proved, that one of the other witnesses to the will, asked him to go to witness Captain *Irish's* will. He went, and found Captain *Irish* in the house of *William*, which adjoined his father's, and there was a door connecting the two houses; that one of the witnesses inquired of Captain *Irish* how he was; that *William* produced a table near his father, on which the will was lying; that the old gentleman said, "I wish you to witness my will," and placing his hand on the paper said, "this is my will, and this is my signature:" it had been signed before. The witnesses signed it.

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He said, "I was of opinion that he was capable," but was not aware of the importance of attending to that; never thought it would be called in question. The will was not read, nor any thing said about it. The other two witnesses were dead; were admitted to be men of good character; were all acquainted with Captain *Irish*. All the wills were attested by three witnesses, and two of these witnesses had been called to attest all the three.

Mrs. *M'Cully* was a daughter of Captain *Irish*; her sister, Mrs. *Smith*, had brought an ejectment, reported, *Smith v. Irish*, 8 *Serg. & Rawle*, to contest the same will. The defendant's counsel offered to read a letter from the late General *Tanyhill* to Captain *Irish*, dated *Washington city*, 12th of *October*, 1814, which purported to be an answer to one received from Captain *Irish*; and in order to introduce it, offered to prove, that in the cause of *Smith v. Irish*, Mr. *Mountain*, the counsel of Mrs. *Smith*, had stated, that the papers of General *Tanyhill* had come into his possession; that among them he had seen a letter of Captain *Irish* to General *Tanyhill*, but could not then find it.

The court, without inquiring whether Mr. *Mountain* had stated this on oath, or admitted it as counsel of Mrs. *Smith*, said, that was a cause between different parties, ended before this commenced; neither the admission of Mrs. *Smith's* counsel, nor the testimony of witnesses in that cause are evidence in this. And the court refused to permit the letter to be read. There was no evidence offered to prove, whether it ever came to the hand of Captain *Irish*, or whether he understood it.

The question was then as to his capacity, and as to whether it was his will, or one made for him. The court thought these papers immaterial, and did not permit them to go to the jury.

After the charge to the jury, the defendant asked to send out the account and receipts above-mentioned to the jury. In the argument of the plaintiff's counsel, they had both conceded, that Captain *Irish* was capable of business up to the second attack.

HUSTON, J. charged the jury:—

Every man has the right to dispose of his property, and ought not to be deprived of this right—is supposed capable to dispose of it; and every man capable of managing his affairs, and making ordinary contracts, is capable of making a will.

The same wish to have the power of disposing of property by will, which all feel, will lead every man to wish that nothing shall be hereafter taken as his will which is not so, but is the result of importunity and imposition on his weakness. Every man may, by disease or visitation of God, lose his mind; and there is nothing more distressing in the contemplation of this most terrible of all evils, than to consider that in such a situation the ties of nature or affection are often lost—sometimes reversed—and that a will made then, may be contrary to the wishes and designs of the

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whole previous life. Men, wiser and richer, and in happier stations than any of us, have been reduced to this situation; and, it would be a great evil if any writing could be established, which writing was at variance with all his intentions when in possession of all his faculties. The will of an insane man, if one who has no mind or memory, ought to be nothing; he must be of soundly disposing mind and memory; he must be able to take a view of his estate, and of his family; to consider the state of his affairs, and of his connexions, and to reflect on them: and the man who can do this without the several parcels of his property being mentioned to him, or the names of his family being brought to his recollection, can generally make a will. If each item of property must be named to him, in order that he may not omit it; if each devisee must be named, or would be forgotten; if a view of the whole cannot be collected or comprehended by the mind of the testator, I should say that he was not of a sound and disposing mind and memory.

A paper offered as a will, must be proved to be the *will of the testator*; he must have written it, or directed it to be written, or directed the devisees, or must have read it, or heard it read, and approved of it, or there is no evidence of its being *his will*.

To be sure, it is not always necessary to prove, that he directed it, that he read it or heard it read, by persons who saw or heard him read it, or who read or heard others read it to him; for a man in ordinary circumstances, and of ordinary mind, would not sign and call others to witness a paper of which he did not know the contents. But in the case of a man not in his ordinary situation, nor of his usual mind, a jury will do well to require some evidence more than what results from the fact of calling witnesses to attest a paper already signed.

If there is proof, that the will was directed to be written, not by the testator, but by another, and that others not only directed the will to be written, but directed its different bequests, and if to all this, that will gives to the person who directed it much more than a child's part; if it was executed too, not in the testator's house, but in that of the devisee; if to all this, other dispositions, made by the testator himself, while undoubtedly sound in mind and body, are produced, and these made a very different disposition of his property, reason and law equally require that the jury should have proof that it is the will of the testator, not a will made for him by another.

I do not say there is no case where the will, even of a weak man, ought not to be supported, though there was no positive proof that he directed it, or read it, or heard it read; but I do say, when the proof is, that the principal devisee directed the will, and the terms of it, a jury ought to deliberate seriously before they say such paper *is the will* of an old and weak man, when there is no proof, that it was read by him or to him. And this more especially, if the

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paper differs essentially from former dispositions, unquestionably made by himself, and before his mind was impaired. The case presents two questions:—

1. Was the testator at the execution of this paper capable to make a will? or was he of a sound and disposing mind?

2. Is this paper his *will*?

The defendant moved for a new trial for the following reasons:—

1st. That the court erred in rejecting the evidence of *William Hays*, offered to prove the characters of the subscribing witnesses to the will in question.

2d. That the court erred in rejecting the letter of *Adamson Tanyhill* to the testator, dated the 12th of *October*, 1814.

3d. That the court erred in their charge to the jury in matters of law and fact, to wit:

4. That the court erred in refusing to permit two receipts and two accounts, which were in the hand-writing of the testator, and had been read in evidence, to be taken out by the jury.

The question in this case turned on the validity of the will of *Nathaniel Irish*, dated the 7th of *November*, 1814. It was alleged that it was not his will, 1st. Because he was not of sound mind when the will was made. 2d. Because it was obtained by fraud and imposition.

It was proved, that the testator had two paralytic attacks; after the first of which, it was alleged, his mind had been much weakened, if not totally destroyed. That after the second, he became still worse, and, as was alleged, was in a state of complete fatuity. The time of this second attack was not precisely ascertained, but at, or about, or after the time, it was proved, that the testator had written a letter, which he requested a clergyman, who then boarded at his house, to direct for him. The defendant offered to give in evidence a letter from *A. Tanyhill*, dated the 12th of *October*, 1814, to the testator, purporting to be an answer to one received from him, which last was alleged to be the same written by him in *October*; in order to show, that he was in a state of sanity. After the rejection of the letter, the defendant offered to prove, by *William Hays*, one of the arbitrators in the case of *Smith v. Irish*, that *Mr. Mounttain*, a relative of General *Tanyhill*, and who had the custody of his papers, (and who is since dead,) proved before the arbitrators, that he had seen among the papers of *Mr. Tanyhill*, after his decease, a letter of the testator's, in his hand-writing, dated in the same month, but that he was then unable to find it after diligent search. The court refused to hear the evidence.

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The papers which the court refused to permit the jury to take out with them were the following:—

1st. A receipt, dated the 29th of *April*, 1814, by the testator to *A. Tanyhill*, for sixty-one dollars and twenty-five cents, which was on the same day entered by the testator in his leger, to the credit of the *United States*, as received by Mr. *Tanyhill* from them.

2d. A receipt to *Robert Townsend*, dated the 5th of *May*, 1814, for money paid by him to the testator, in the testator's hand-writing.

3d. Account of the testator with *Abraham Watkins*, coming down to the 1st of *May*, 1814, all in the testator's hand-writing.

4th. Account of the testator with *Richard Geary*, coming down to the 1st of *June*, 1814, all in the testator's hand-writing.

These papers had been read in evidence at the trial, (so were the books of the testator,) for the purpose of showing the testator's sanity at their respective dates, which were all after the time of his alleged insanity. And the defendant's counsel had requested that they should be sent out by the jury, but the court refused, although they permitted the testator's books to be sent out.

Mr. <i>Abraham Watkins</i> to <i>N. Irish</i> ,			Dr.
1811,	Jan. 25,	To 1069 feet of seasoned pine boards, at \$1,25, - - - - -	\$13 36
"	Feb. 21,	To 276 feet of seasoned pine boards,	3 45
"	March 19,	To 16 feet of oak scantling, at 2 cents,	32
"	April 2,	To 82 feet of oak boards, for the roof,	1 02
"	" 22,	To 19½ feet of picked pine boards,	29
"	" 23,	To 31 feet of poplar boards, - -	37½
"	June 8,	To 40 feet of ¾ boards, - - -	50
"	Sept. 28,	To 109 feet of boards, delivered to a man you bought wool of, - -	1 33
(Original says,) carried over,			20 64
1812,	Sept. 4,	To 44 feet of 4 by 5 oak scantling, at 1½, - - - - -	77
1813,	Feb. 15,	To 77 feet of picked boards, at 1½ cts,	1 14
"	March 26,	To 20 feet of pine scantling, 5 by 8, 3½ cents, - - - - -	70
1812,	Nov. 1,	To a years' ground rent, due Nov. 1, 1812, - - - - -	38 00
1813,	Aug. 24,	To 38 feet of pine scantling, at 3½ cts.	1 33
"	Nov. 1,	To a year's ground rent, - -	38 00
1814,	May 1,	To half a year's ground rent, - -	19 00
			<hr/> \$119 58

(M'Cully v. Barr.)

			Dr.
1813,	Aug. 10,	To 25 feet of pine log, at 6 cents, -	\$2 10
"	" 15,	To 58 feet of pine boards at 1½ cents, by boy, - - - - -	72½
"	" 30,	To 265 feet of rough boards, - -	2 65
"	Sept. 16,	To a pine girder 30 feet long, at 10 cts.	3 00
1814,	May 14,	To 834 feet of seasoned pine boards, at \$2, - - - - -	16 68
"	" 28,	To 40 feet of half inch boards, -	50
			<hr/> 25 65½

Contra Cr.

1813,	June 8,	By charge due you, \$1,90 }	
"	Sept. 4,	By cash on account, 3,00 }	5 90
1814,	May 28,	By " " 1,00 }	
			<hr/> 19 75½
To D. Beltzhoover's account, - -			4 97
			<hr/> 24 72
"	June 1,	To 253 feet of boards, at \$1,75, -	4 42
			<hr/> 29 14
"	" 1,	By cash, - - - - -	5 00
			<hr/> \$24 14½

Received, *April 29th*, 1814, of General *Adamson Tanyhill*, sixty-one dollars and twenty-five cents, in full of my account against the *United States*, as sent to the secretary of state's office in *December* last.

(Signed,) *Nath. Irish.*

Received *May 5th*, 1814, of Mr. *Jesse Townsend*, by the hands of *Robert Townsend*, seventeen dollars, on account of money paid to the said *Townsend*, it being due me from *John Sheldon* of *Fayette* county.

(Signed,) *Nath. Irish.*

The opinion of the court was delivered by

GIBSON, C. J.—Evidence of what Mr. *Mountain* testified in an action between other parties, was incompetent in the action trying; and the testimony of *Hays*, therefore, was properly overruled.

The letter of *Adamson Tanyhill*, purporting to be in answer to one alleged to have been written by the testator, was not competent evidence of the contents of the supposed letter, or of its having in fact ever existed; and this, though there were proof that the testator had written a letter to some one about the particular time. It is a fundamental rule, that evidence shall be given under the

(M'Cully v. Barr.)

sanction of an oath; to which no other exceptions are at present recollected, than the instances of character, boundary, and pedigree, in which hear-say is admissible; and the declarations of deceased persons in prejudice of their interest. As to the facts asserted in it, the letter of Mr. *Tanyhill* is precisely on a footing with declarations by a deceased person; and as the declarations which it contains, were not in the nature of an admission to charge him, there is no room to say they are competent evidence to charge another.

The part of the charge in which error is alleged, is in substance this: "If there is proof that the will was directed to be written, not by the testator, but by another, and that other not only directed the will to be written, but directed its different bequests; and if to all this, that will gives to the person who directed it, much more than a child's part; if it was executed, too, not in the testator's house, but that of the devisee; if to all this, other dispositions made by the testator himself, when undoubtedly sound in body and mind, are produced, and these made a very different disposition of his property, reason and law equally require that the jury should have proof that it is the will of the testator, not a will made for him by another." In this conclusion of the judge, there certainly was no misdirection in point of law; and we are satisfied, that the facts thus stated hypothetically, were such as the jury might adopt without any forced or unnatural construction of the evidence; and, the inference from the whole would have arisen, even though no such facts had been proved.

The receipts and accounts mentioned in the fourth exception, ought undoubtedly to have gone out with the jury. But by the *English* practice, an error in this particular, is not a ground for setting aside the verdict; and this practice appears to have been quoted with approbation in *Alexander v. Jameson*, (5 Binn. 238,) by the judges of this court. In motions for new trials, the courts here have been less regardless of technical errors than the *English* judges. A sight of these papers in the box, must have been amply sufficient to satisfy the jury of the *quantum* of capacity shown by them to have been in the person who wrote them. Had they been adduced as evidence of indebtedness in a matter determinable by calculation, the exception would have had more force; but as substantial justice seems to have been done, this unimportant error must not prevail.

Judgment affirmed.

[PITTSBURG, SEPTEMBER 23, 1828.]

TAYLOR and FITZSIMMONS *against* HENDERSON.

IN ERROR.

81 PSR 4

In a suit against several partners, some of whom only are served, and appear and plead to issue, the plaintiff cannot compel one of the others not served nor appearing, to testify on his behalf.

The admission of one of the defendants sued as partner, that he and others composed the firm, is evidence.

Though in a suit against several partners, some of whom have not appeared, the plaintiff declares against all, he may, after verdict against the rest, have judgment against the latter.

WRIT of error to the Court of Common Pleas of *Allegheny* county.

The action was commenced by a *capias* in case, bail four thousand dollars, in which *John Henderson*, the defendant in error, was plaintiff, and *Thomas Taylor*, *Thompson M'Kean*, *Samuel K. Page*, and *William Fitzsimmons*, partners, trading under the firm of the Cool Spring Furnace Company, were defendants. The writ was endorsed, "no bail required of *Thompson M'Kean*," and was returned C. C. and B. B. The declaration was in the common form on a promissory note, and stated that *Thomas Taylor*, *Thompson M'Kean*, *Samuel K. Page*, and *W. Fitzsimmons*, partners, trading under the firm of the Cool Spring Furnace Company, were attached to answer, &c. There was no statement of not served as to any of the defendants. No appearance of record was entered by *Page* or *M'Kean*. There was an appearance by attorney for *Taylor* and *Fitzsimmons*. A bail bond was taken from the latter, and special bail entered by them, and they alone pleaded.

On the trial, the plaintiff called several witnesses to prove who were the partners at the time the note was drawn, and then called *Samuel K. Page*, one of the defendants. Mr. *Page* objected to being sworn as a witness, and the defendants also objected to his competency. But by the court, it appearing that Mr. *Page*, with *Thompson M'Kean*, another of the defendants, had been discharged on common bail by order of the plaintiff's attorneys,—that he had not pleaded, and that the only act done by him in defending this suit was, joining in the commission to take testimony on the part of the defendants in the state of *Maryland*, the court, therefore, overrule the objections, and direct Mr. *Page* to be sworn. The defendants excepted.

The plaintiff's counsel offered to prove by *M. J. Mason*, one of their witnesses, that in a conversation with *William Fitzsim-*

(Taylor and Fitzsimmons v. Henderson.)

mons respecting the note, *Fitzsimmons* said that *McKean*, *Page*, *Taylor*, and himself, were the partners composing the Cool Spring Furnace Company, at the time the note was given. This evidence the defendants objected to, but the court admitted it and sealed another bill of exceptions.

The jury gave a verdict for the plaintiff, and judgment was rendered thereon.

Burk, for the plaintiffs in error.

1. The court erred in compelling *Samuel K. Page*, one of the defendants, to be sworn against the other defendants. 2 *Ves.* 222. 2 *Yeates*, 263, is in point: a party to the record may be sworn only with his own consent, 324. 2 *Yeates*, 154. Even a party not arrested is not compellable to give evidence. 3 *Serg. & Rawle*, 402. The same principle as the last case. *Bull. N. P.* 285. 1 *Phillips*, 63. 2 *Starkie*, 764, 765. 3 *Starkie*, 1062.

2. There was error in taking judgment against some of the defendants after declaring against all. 13 *Serg. & Rawle*, 289. 11 *Serg. & Rawle*, 357.

3. The plaintiff must first show partnership, before the declarations of one are to affect the rest. 14 *East*, 225. 2 *Stark.* 1072.

Baldwin, contra.

Page was no partner, he was not served, and there was no appearance for him. 4 *Serg. & Rawle*, 398. A party interested may be compelled to give evidence. 3 *Johns. Ca.* 234, 235. 8 *Johns.* 428. 1 *Am. L. Journ.* 223. The plaintiff in error is not injured by violation of *Page's* privilege; the objection was not to the testimony.

The opinion of the court, (ROGERS, J. dissenting,) was delivered by

GIBSON, C. J.—Ever since the decision in *Steele v. Phoenix Ins. Co.* (3 *Binn.* 306,) we have followed the chancery practice of permitting a naked trustee to testify in favour of the trust, or a party who is on the record, but otherwise disinterested, to be examined with his own consent. On the other hand, there has been no relaxation of the common law rule which prohibits the examination of a defendant by the plaintiff. This rule is supposed to be founded on the interest which the defendant has as a party; and hence the decision in *Baird v. Cochran*, (4 *Serg. & Rawle*, 327,) is pressed upon us as having removed its foundation. But the case of a witness who discloses a promise on which he may possibly, though not certainly, be made liable in another action, is readily distinguished from that of a party or privy, who is to be fixed immediately by the judgment, and who, in giving evidence that tends to

(Taylor and Fitzsimmons v. Henderson.)

that conclusion, testifies directly against himself. The evidence of the former can be used in a subsequent action, not as his *testimony*, but as his *admission*; and although such admission may have been extorted, he can, with no propriety, be said to have testified against himself. Although this distinction be purely technical, it is not the less founded; for the most ordinary rules of evidence are sometimes exclusively technical in particular cases; as in excluding a witness of approved integrity, actually interested to the value of a farthing, and admitting another of conclusively bad character, though labouring under a mistaken belief that he is interested to the value of thousands. Such incongruities are naturally and unavoidably produced by rules which, from their generality, cannot be exactly adapted to particular cases. But in point of reason and justice, the condition of a witness who is compelled to admit his own liability, is not distinguishable from that of any other stranger, whose interest is disregarded whenever the question arises on a real matter of right which it is necessary to try, and where it is not wantonly sacrificed; for instance, by a wager which outrages his feelings or involves his character. And if he be not privileged from disclosing the fact, there is no reason why he should be excused from swearing to it. In principle, his case is that of a person who is compelled by a subpoena, to produce a paper that may be subsequently used against him. These are sacrifices to the exigencies of justice, from which no man is exempt. In *England*, a majority of the judges thought a witness could claim no such privilege; but, it was thought proper to provide for the case by a statute, which has, however, not been held to extend to the case of a party; which shows that the courts there, have thought there is a difference. Thus, it appears that interest is not the foundation of a party's privilege; and if it were, an argument built on the decision in *Baird v. Cochran*, would prove too much, as it would establish a right in the plaintiff to examine a defendant when incontestably a party, or a mutual right in the parties to examine each other. Although interest furnishes a perfectly satisfactory reason for excluding the testimony of a party when in his own favour, it would furnish no reason at all for excluding it when against him. The true reason seems to be the extraordinary temptation to which it would expose him; or perhaps the unjust advantage it would give his adversary, as the motive which would induce the jury to give implicit credit to all he should say against himself, would prompt them to disregard whatever he might say in his own favour. But whatever be the reason, it is not to be doubted that a party cannot be examined against his will: and the question, therefore is, whether Mr. *Page* stood before the court in that character.

To constitute a party, it is not necessary that the name be on the record; else a *cestui que trust* might be examined against himself in an action by the trustee. Courts invariably treat the

(Taylor and Fitzsimmons v. Henderson.)

person actually interested, as the real party. But the name of Mr. *Page* was in fact on the record, and if he were substantially concerned in the action, (which I shall attempt to show,) he was a party to every intent. On this point, the judges, in *Purviance v. Dryden*, (13 Serg. & Rawle, 402,) expressed opposite opinions. It was, however, not the point decided; and for the same reason, I lay not so much stress on the opinion of the judges in *The Lessee of Diermond v. Robinson*, (2 Yeates; 324,) and *The Lessee of Patterson v. Hagerman*, (*Ib.* 163,) in which the privilege of a defendant in circumstances exactly like the present, was distinctly recognised. In *England* a defendant not taken, is nevertheless a party who must be proceeded against to outlawry; and having thus disposed of him on the record, the plaintiff may declare against the rest. In our practice, the only difference is, that he is treated as if disposed of already: but still he is a party to the action; for a defendant disposed of, though not a party to the issue, cannot be examined by the plaintiff; as in the instance of a cotrespasser who has let judgment go by default; (*Starkie's Ev. pl. iv.* 766,) and the reason is, that he is nevertheless involved in the consequences of the verdict. In *Downey v. The Farmers' Bank of Greencastle*, (13 Serg. & Rawle, 288,) it was determined, that notwithstanding only one has been summoned or taken, the action continues to be joint; yet that could not be, if the others were not parties. And it was held at *Sunbury* in *June* last, that the plaintiff is not bound to drop a defendant who has not been served, but may still bring him in by an *alias* engrafted on the original writ. It seems to me, therefore, that Mr. *Page* was clearly a defendant in form; and let us see whether he were so in substance.

A verdict in favour of the others, would be in favour of him also, because it would conclude the plaintiff from having recourse to him in any event, as he otherwise might on the principle of *Lang v. Keppeler*, (1 Binn. 123.) This is proved by *Downey v. The Farmers' Bank of Greencastle*, in which it was held, that the judgment in an action on a joint and several bond, against both obligors, may be pleaded in bar to a several action against one of them who was not served. And this further proves him to be a party or privy, inasmuch as the record would not otherwise be evidence in his favour. So, a verdict against the others, would conclude him in an action for contribution. Here, however, such an action would be necessary, as the defendants were charged as partners; and this leads to another most important consideration, that Mr. *Page's* interest in the partnership effects, would be levied and sold immediately in execution of a judgment against the others. For the separate debt of a partner, I admit, only his separate estate can be sold; and as by the contract of partnership, the debts are to be paid before capital or profits can be divided, it follows that he has no specific interest in the partnership effects,

(Taylor and Fitzsimmons v. Henderson.)

but only in what may remain after the settlement of the partnership account, and nothing beyond can be levied. But for a partnership debt, the entire property in the specific thing must be sold, even in a judgment against one of the partners; because through the medium of the execution, the law compels him to make the same application of the joint funds to the joint debts, that it was undoubtedly competent to him to make voluntarily. The sheriff levies and sells the entire property, because the partner defendant has no specific share that may be levied and sold separately; and, even were that otherwise, yet unless the sale should work a dissolution of the partnership *pro tanto*, the remainder would not be the property of the other partners individually, but of the firm, and liable to execution by any other joint creditor; so that the sheriff might as well go on and levy the whole at once. Besides, as the other partners would be liable to contribution, their remaining interest in the effects sold, being carried into the partnership account, would entitle them to a credit exactly equal to what should be necessary to reimburse the partner defendant, the loss of his individual share: so that the effect of selling a part or the whole, would, as between the partners themselves, be exactly the same; nothing being gained by the sale of an undivided interest but the embarrassment incident to a joint ownership by the purchaser and the firm. Thus, I take it to be clear, that the interest of Mr. *Page* in the partnership effects, might be sold on a judgment against the others, just as if he had appeared to the action; and he was, therefore, a defendant both in substance and in form, although not technically a party to the issue.

The law enjoins, that all be sued who are jointly liable. This injunction would be of little worth if, by instructing the sheriff not to serve particular defendants whose testimony should be desired, the plaintiff might produce the same result as if they had not been sued. In answer to this, it is suggested that the same purpose might at all events be effected by a *nolle prosequi*. But, I apprehend that a *nolle prosequi* can be entered as to particular defendants only where there has been a severance in defence; and even then, not to use them as witnesses. Again, it has been said, that a defendant not served may obviate the consequences by a voluntary appearance. But to what purpose, when the plaintiff cannot proceed against him? It is clear, on the authority of *McFall v. Williams*, (2 Serg. & Rawle, 288,) that there cannot be two verdicts on a joint liability in the same action. If he was apprized of the suit at the return of the writ, he might perhaps force himself on the plaintiff as a party; but he might be ignorant of the existence of the action, and an appearance after issue joined would be too late.

The remaining errors are not sustained. The declarations of Mr. *Fitzsimmons*, one of the defendants, were obviously evidence against himself, to prove the partnership, a fact which might be established by the separate admissions of all the defendants. And

(Taylor and Fitzsimmons v. Henderson.)

the consequences of having declared against all the defendants, are obviated by taking judgment only against those who were served. The judgment, therefore, is reversed for the first error.

ROGERS, J., dissented, being of opinion that *Page* was rightly compelled to testify.

Judgment reversed, and a *venire facias de novo* awarded.

OBITUARY NOTICE.

On the 16th of November, 1827, died at Carlisle, THOMAS DUNCAN, Esq., Associate Justice of the Supreme Court of Pennsylvania, to which station he was appointed on the 14th of March, 1817.

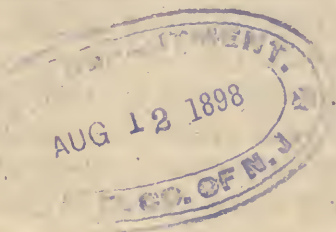
At a meeting of the Bar of Philadelphia, it was resolved, that an obituary notice of this eminent man should be published, and in pursuance of this resolution, the following short memoir is inserted in the present volume of the Reports, as the most appropriate record of the worth of the deceased, and of the esteem in which he was held.

He was born at Carlisle, in Pennsylvania, on the 20th of November, 1760, his parents, of Scottish extraction, having been established there for a considerable time. The subject of this notice was educated by Dr. Ramsey, the historian, at an academy kept by him at Carlisle. He studied law with the late Judge Yeates, at Lancaster, and was admitted to the bar in 1781. Having settled himself at Carlisle, he soon acquired extensive and profitable practice, and became eminent throughout an extensive circuit, and in the Supreme Courts of the state, as also in the Circuit Court of the United States for the district of Pennsylvania.

By successful industry as a lawyer, he acquired considerable property, and possessed large landed estates. His residence at Carlisle was the seat of liberal and elegant hospitality, and his professional reputation was very high when he succeeded Judge Yeates on the bench of the Supreme Court.

He was enthusiastically devoted to the learning and practice of the law; indefatigable and zealous at the bar; prompt, decided, and courteous as a judge; deep in research; copious of illustration; fond of authorities; and in all the departments of the land laws especially distinguished. In his familiar intercourse amiable and conciliatory, fortunate and beloved in a large domestic circle, and universally regarded as a man of honour, intelligence, and independence.

During the ten years and upwards of his service on the bench, the reports of its judgments bear ample testimony to his large share in its usefulness. Since his death, the profession and the public acknowledge continual occasion to regret his loss, and admire his character.



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1. An administrator having goods of the intestate in his hands, belonging equally to the heirs, cannot by charging himself with them in his accounts at the appraised value, make them his own, and then divide them unequally among the heirs.

Nor can a guardian who represents several minors, receive their money or property, and, being insolvent, give it all to one, and little or nothing to the others; but it will still be considered as theirs in equal shares.

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2. The United States, when plaintiffs in court, are entitled to appeal from an award of arbitrators without affidavit or security, and without paying costs. *The United States v. Barber.*

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APPORTIONMENT.

1. Testator died the 16th of May, 1814, having by his will devised to his wife a house and garden, during her natural life, and then to her son.

He also gave her some other specific bequests, and then bequeathed her one hundred dollars yearly and every year, during her natural life, and fifty dollars to be paid in one month after his decease, all which devises and bequests were in lieu of dower. The wife died the 22nd of March, 1824.

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1. If, in a writ against two, and rule of reference taken out by the plaintiff, it appears by the record, that one of the defendants appeared and acted for himself and as agent for the

other, and an award was made against both, it will be held good on a writ of error. The party should, if the agent were unauthorized, have applied to the court below for relief.

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ASSIGNMENT.

1. An assignment in trust to pay, in the first place, preferred debts, &c. and then all other debts, absolute on the face of it, is null and void against the creditors, if the grantor retain and use, and dispose of the property as his own; though the creditor who levies on it has notice of the assignment before his judgment.

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1. Assize of nuisance is an existing remedy in *Pennsylvania*, not altered in essential points, though in matters of form it ought to be adapted to modern practice.

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Nor are the proceedings irregular because there has been a defect in the pleading, since the whole case may be put before the recognitors at large, without regard to pleading.

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1. An attorney who has a contract with a party for a certain sum as a fee in case of recovery, is a competent witness for him if it does not appear that the contract is under seal or capable of being enforced. 312
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2. Under the act of 1814, banks have a lien on stock, though levied on by a judgment creditor, for notes drawn before but falling due after the levy, even though renewed.

On a sale of stock in bank on an execution, the record is the evidence of the vendee's title.

If a debtor to a bank which has a lien on his stock owes less than the value of it, the bank may hold the whole till that debt is paid: they are not obliged to appropriate part and transfer the rest.

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1. The obligors wrote their names, and affixed their seals to a piece of paper, and left it with the judge of the court with instructions to fill it up as a bond, conditioned to take the benefit of the insolvent act, which was accordingly done: *held*, that the bond was valid and binding on the parties. *Wiley v. Moor.* 438

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1. The statute 43 *Eliz. c. 4*, of charitable uses, is not extended to *Pennsylvania*, but still the principles of it, as applied by chancery in *England*, obtain here by force of our own common law, and relief will be given so far as the power of the courts will enable them.

A bequest of money to a church, to be laid out in bread annually for ten years, for the poor of the congregation, is good.

So is a bequest of money to trustees, with directions to invest it, so that the interest may be applied, from time to time, towards the education of young students in the ministry of a congregation, under the direction of the vestry. *Witman v. Lex.* 88

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1. A decree, by the Court of Common Pleas, awarding to a claimant money arising from a sale of land by the sheriff, paid into that court, is final and conclusive, though the court may

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1. In debt on a sealed note for a certain sum, the plaintiff is not permitted to give in evidence an agreement by the defendant, showing that the note was to be drawn payable with interest, and that payments made on account were appropriated to the interest.

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If the defendant examines a witness, the plaintiff cannot by cross-examination elicit such agreement, though it made a part of a conversation of which the witness had given evidence. *Reichart v. Beidleman.* 41

2. The declaration in the first count, stated a promise by the defendant's intestate, that in consideration that the plaintiff would live with the intestate till her marriage, he would give her one hundred acres of land: other counts laid the promise to be in consideration of her living with the intestate, and marrying G.S. Plaintiff averred performance. *Held*, that the

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DEEDS.

See ASSIGNMENT.

1. Husband and wife, by deed duly executed, conveyed the wife's estates to G. M. P., in trust to convey to the husband and wife during their lives and the life of the survivor, and the remainder to the heirs of R. M. and A. his wife, and their heirs. The trustee, G. M. P., by a deed dated five days after, but executed at the same time, and intended to express the meaning of the grantors, and drawn by their direction, conveyed to the grantors during their lives and the life of the survivors, and separate remainders of the separate tracts to the respective children of R. M. and A. in fee simple: *Held*, that they were to be considered as one conveyance, and the estates were vested under the latter deed; and, also, that parol evidence was admissible, to show the intent of the grantors to be what the latter deed expressed. *Thompson v. McElenachan.*

110

DELAWARE RIVER.

1. The jurisdiction of the city of Philadelphia extends to the Jersey shore, subject to the compact between the two states. *Neal v. The Commonwealth.*

67

DEVISE.

See CHARITABLE USES.

1. Devise by the testator to his sons *James* and *David* of all the residue of his estate to them and each of them share and share alike, to them and each of them their heirs and assigns for ever; and in case either or both of his said sons should die without heirs of his body, their share or shares to be equally divided among certain legatees before named: *held*, that *Joseph* and *David* were tenants in common in tail, with a vested remainder on the death of either, without heirs of the body, to the legatees mentioned.

Children merely named in the will as having received their share of the testator's estate, are not entitled, under a devise to "the legatees above named."

But *David* is a legatee within such description, and entitled to a share of *Joseph's* half on the death of *Joseph* without issue. *Irvin v. Dunwoody.*

61

2. Testator, by his will, directs the funeral expenses and debts to be paid as soon as conveniently may be after his decease. He then gives his wife certain enumerated articles, such as a cow, side saddle, chest, &c., and the use of a house with its appurtenances, during widowhood. "I likewise give and bequeath to my said wife M., the one third part of my personal estate," all which legacies he declares to be in lieu of dower. He directs his executors, as soon as conveniently can be done, to hold a vendue, and sell all that part of his personal estate not heretofore or hereafter bequeathed to his wife or children, to the best advantage, causing the same to be appraised before the sale. He appointed an executor

- with power to sell his real estate: gave some specific legacies to his children, and the residue of his estate to be equally divided among all his children. *Held*, that the whole of the debts must be first paid out of the personal estate, and the one third of the remainder thereof passed by the will to the widow. *Martin v. Fry*. 426
3. Devise to testator's daughter C., her heirs and assigns. Another devise to testator's daughters S. and M. respectively, and their respective heirs and assigns. If either of them died without issue, that then the share of the said daughter should vest in the other two if living, or in the daughters' surviving children, &c. *Held*, that S. took an estate tail, with remainder in fee to her sisters or their children. *Cuskey v. Brewer*. 441

DISTRESS.

1. The goods of a third person placed in the way of trade on storage in the warehouse of one who used the trade and business of a merchant, and received goods and merchandize from merchants and traders on storage, are not liable to distress for rent for such warehouse, though found on the premises. *Brown v. Sims*. 138

DISTRIBUTIVE SHARE.

1. Where a balance remains in the hands of the administrator, the usual mode of designating the persons entitled, is by action at law: but the Orphans' Court, on the petition of any one interested, would be bound to proceed, and decree distribution.

In such proceeding, notice should be given as far as the nature of the case admits, and the whole subject should be acted on.

A decree leaving it uncertain who were the parties designated, is void.

A plea to an action founded on such decree, that the plaintiff is not the person named therein, is a good plea in bar. *Purviance v. The Commonwealth*. 31

DIVORCE.

See CIRCUIT COURT, 4.

DOWER.

1. Testator bequeathed to the widow twelve hundred dollars and various specific legacies, and devised the real estate where he lived to his son, *Isaac*, with remainder to his daughters, and a house and lot in *Carlisle* to his son *John*, he paying three thousand dollars to his daughters, and died in *August*, 1823. The widow accepted some of the specific legacies, but on the 10th of *November*, 1823, filed in the Register's Office a written refusal to take under the will. She afterwards received the twelve hundred dollars from the executors in full of the sum bequeathed; and by a written instrument reciting an agreement between her and the principal devisees and legatees, that *Isaac* pay her in addition four hundred dollars, she, in consideration thereof, released all right of dower, excepting and reserving all privileges, legacies, and rights under the will, and all right of dower to the real estate situate in *Carlisle*, it being expressly understood she refused to take under the will, and elected to take under the intestate laws, and that the release was a compromise with *Isaac* and the executors, and the reference to the will was only to designate the privileges, &c. *Held*, that the widow was not entitled to dower out of the

real estate situate in *Carlisle*.

Cauffman v. Cauffman. 16

2. If a verdict in dower, where the husband did not die seised, finds, among other things, the value of the land, this will be considered as surplusage, and not vitiate the rest. *Leineweaver v. Stoever*. 297

EJECTMENT.

1. In ejectment for land sold by execution, the plaintiff may recover against all who were defendants in the original judgment, or held under them, without showing other title.

A plaintiff is not estopped from recovering in ejectment under a title to the defendant's land by sale on a *levari facias* issued on a judgment in a *scire facias* on a mortgage, notwithstanding he has, since obtaining such title, levied upon and sold the land to a third person by execution on another judgment, if at the time of the condemnation and sale under the latter execution, he gave notice of his prior title, and that the sheriff only sold the defendant's claim, whatever it might be, and the plaintiff had brought his ejectment previously.

A verdict for the plaintiff for a four hundred and twelve acre tract, deducting one hundred acres described in an agreement specified in the verdict, is sufficiently certain. *Green v. Watrous*. 393

2. Verdict in ejectment "for the plaintiff one half of the survey, according to a draft signed by H. C., deputy surveyor, and filed in this case; the land to be laid off according to quantity and quality, reserving to M. M., (the defendant, as much of the improvement as practicable," with six cents damages, and six cents costs: held bad. *Martin v. Martin*. 431

ELECTION BY WIDOW.

See DOWER.

ERROR.

See EVIDENCE. EXECUTION.

1. The Supreme Court, when sitting out of the county of *Philadelphia*, cannot entertain a writ of error for error in fact. *Watson v. Mercer*. 343

ESTATES.

See DEEDS, 1. REAL ESTATE.

ESTATE TAIL.

See DEVISE.

ESTOPPEL.

1. In an action on the case for the continuance of a nuisance in erecting a dam, a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, are conclusive evidence.

That the defendant has discovered new evidence, not in his power at a former trial, forms no exception to the rule at law or equity.

But, in such action, the plaintiff, to avail himself of this conclusiveness, must take care not to waive it by pleading; as if the defendant plead a license, and the plaintiff does not, in his own replication, rely on the estoppel of the former judgment, but replies, no license, the jury are not precluded from inquiring into the truth of the case.

In actions, however, of debt, *assumpsit*, &c. where special pleading is not required, the record of a former recovery is conclusive evidence, binding on the party, the court, and the jury. *Kilheffer v. Herr*. 319

2. If a defendant give in evidence as a judgment, an award in his favour in ejectment, he is af-

terwards estopped from reversing it on error.

Estoppels are favoured where they promote equity, and a party may be estopped by giving a matter in evidence as well as by pleading it. *Martin v. Ives.* 364

EVIDENCE.

See WITNESS. DECLARATION, 1.
PARTNERS, 2.

1. A deposition, taken before the register of wills, in support of an alleged will, in consequence of a *caveat* by one of the persons interested in preventing the probate, is evidence on the issue of *devisavit vel non*, ordered by the Register's Court on an appeal afterwards entered by another person interested, not a party to the original proceeding. *Ottinger v. Ottinger.* 142

2. A counsel may give evidence of what a witness, since deceased, swore on a former trial, from his notes, though he does not recollect the evidence independently of his notes, nor whether there was a cross-examination, and gives only the substance of the former testimony.

But, if the witness is living in the county, the notes of his testimony are not evidence, though he has since the former trial become interested in the cause.

Chess v. Chess. 409

3. Evidence is not admissible in ejectment, in which the question is as to the validity of a will, of testimony or admissions in a suit brought between other parties, although the question is the same.

A letter, purporting to be an answer to one written by the testator, is not evidence to show the contents of the supposed letter of the testator.

It is not a ground to grant a new trial in a question on the capa-

city of a testator, that the judge refused to let certain accounts and receipts, produced in evidence, to be taken out by the jury, though it ought regularly to have been permitted. *McCully v. Barr.* 445

EXECUTION.

See EJECTMENT, 1. REPLEVIN, 1.

1. Where a defendant complains of irregularity in the issuing of a *fieri facias* after a year and a day without a *scire facias*, on which his lands were sold, he should complain at the earliest opportunity: if he lies by, he is considered as waiving the objection by his laches.

The complaint should, in the first instance, be made to the Court of Common Pleas, if the process issued there. *Bailey v. Waggoner.* 327

2. As respects third persons, a levy on personal property is a satisfaction to the plaintiff: but, as between the plaintiff and defendant, if the plaintiff has released such levy, the judgment not being paid, it is no satisfaction.

To relieve against an execution unduly issued in the court below, application should, in the first instance, be made there: but, if enough appear on the record to decide the dispute, the Supreme Court will determine it on writ of error. *Duncan v. Harris.* 436

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATOR.

1. If executors, who are appointed by the will trustees to purchase land for the use of the testator's daughter, so that her husband can have no share of it, and in the meanwhile to pay her the interest, have received the money, and suffered a length

of time to elapse, and then refuse to perform the trust, and claim the money on the foundation of a release fraudulently obtained by paying about one half of the money due, which sum the husband had laid out in land as the will directed, and the plaintiffs offered to let the money, when recovered, remain in court to be laid out in the same way, the husband and wife, suing for the use of the wife, may recover as well the principal money due as the interest, in an action of *indebitatus assumpsit*, against the executors as such.

The naming the defendants executors in the writ, is surplu-
sage.

A release obtained by executors and trustees from the *cestui que trusts*, strangers living in another state, by payment of about half the money due, is fraudulent and void. *Bixler v. Kunkle*.

298

A decree of the Orphans' Court settling the accounts of an executor, is conclusive as to all matters contained in it, in an action for a distributive share, or any collateral suit.

It seems that if a parent has given a child more than would be its share, and dies intestate, such child cannot be compelled to refund.

Where heirs make an arrangement among themselves, whereby a large part of the fund coming from the intestate is withdrawn from regular distribution, and release this part to a single heir, query, if the administrator can be made answerable for not distributing according to law, by compelling those advanced to bring their shares into *hotch pot*. *McFadden v. Geddes*. 336

3. The administrator and his sureties are not liable on the ad-

ministration bond for the proceeds of real estate of the intestate sold by order of the Orphans' Court. *Beale's Executors v. The Commonwealth*. 392

FEES.

See INSPECTOR OF BEEF, 1. JUSTICE OF THE PEACE, 1.

1. It seems, an officer cannot withhold his services till he receives his fee: nor divide an act of duty into several parts so as to make separate charges of less than forty shillings in order to preclude the right of appeal. *The Commonwealth v. Genther*.

135

2. A prothonotary who held his office from 1810, to the passing of the act of the 24th of March, 1818, is not chargeable to the commonwealth with a tax on the fees received by him after the latter date, for services rendered while he held his office.

An act taxing a public officer is not to be construed retrospectively, if its language in that respect be doubtful. *Hiester v. The Commonwealth*. 255

GUARDIANS AND WARDS.

See ADMINISTRATOR.

1. A ward cannot, on coming of age, sustain *assumpsit* against his guardian in the Court of Common Pleas for the work and labour done by him for the guardian during his minority. The Orphans' Court is the proper tribunal to settle accounts between guardian and ward.

In what cases the guardian is bound to compensate the minor for his services. *Denison v. Cornwell*. 174

HUSBAND AND WIFE.

1. If a husband deserts his wife and ceases to perform his marital duties, the acquisitions of property made by the wife during such desertion are her se-

- parate estate, and she may dispose of them by will or otherwise. *Starrett v. Wynn.* 130
2. If a husband, by deed of separation without trustees, relinquish to his wife all his right in her land, reserving the payment of an annual sum, the land is not liable to the execution of a creditor of the husband, who obtains judgment after the husband and wife have been notoriously separated for nine years. *Bouslaugh v. Bouslaugh.* 361

INCOMPATIBLE ACT.

1. The selection of an editor of a newspaper, to print the laws of the *United States*, by the secretary of state of the *United States*, is not conferring an office, appointment, or employment under the *United States*, incompatible by virtue of the act of assembly of the 12th of *February*, 1802, with the office of alderman of the city of *Philadelphia*. *Commonwealth v. Binns.* 219

INDICTMENT.

1. Indictment for misdemeanor lies against an inspector of provisions for refusing to perform his duty. *Commonwealth v. Genther.* 135

FORNICATION AND BASTARDY.

See QUARTER SESSIONS.

FRAUD.

See EXECUTORS AND ADMINISTRATORS, 1.

INSPECTOR OF BEEF.

See INDICTMENT, 1. FEES.

1. The inspector of beef is entitled to the fee of a shilling for each cask repacked, whether in the course of his ordinary duties or otherwise.

But a charge for coopering is allowed only where the cask was

originally defective, not for merely replacing the head. *Commonwealth v. Genther.* 135

INTEREST.

See DECLARATION, 1. LEGACY, 3.

INTESTATE.

See SERVANTS. PHYSICIANS.

JUDGMENT.

See LIEN, 1. PARTNERS, 2.

1. Prior to the act of the 24th of *March*, 1827, an amicable agreement to revive a judgment, duly entered on the docket within five years, was a sufficient judgment of revival, as well against subsequent mortgagees, as against the defendant in the judgment. *Leshner v. Gillingham.* 121

JURORS.

1. It is a good cause of challenge to a juror by the commonwealth, in a capital case, if, on being called to be sworn, he declares that he has conscientious scruples on the subject of capital punishment; and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict. *Commonwealth v. Leshner.* 155

JUSTICE OF THE PEACE.

1. Notice to a justice of the peace of the cause of action, in a suit for the penalty of fifty dollars, for taking more than the legal fees, need not specify what fees he was entitled to receive.

Where a justice of the peace binds over a defendant and his surety, he can only charge a fee for one recognisance. The same rule applies to a prosecutor and his witnesses.

No more than twelve cents and a half can be charged by a magistrate as a fee for settling an assault and battery.

A justice of the peace incurs the penalty of the act by demanding and receiving illegal fees, though it is done by mistake or ignorance and without any corrupt intent. *Coates v. Wallace.* 75

2. A suit on a sheriff's bail bond in fifteen thousand dollars, where the plaintiff's demand is less than one hundred dollars, cannot be sustained before a justice of the peace. *Commonwealth v. Reynolds.* 367

3. Where the plaintiff appeals from the judgment of a justice, the defendant may obtain a judgment in court for a sum exceeding one hundred dollars. *Boone v. Boone.* 386

LANDS.

See VENDOR AND VENDEE. EXECUTORS AND ADMINISTRATORS, 1.

1. Consentable lines between adjoining owners under settlement or warrant, determine the boundary: but if either party abandon his claim in whole or in part the other may extend his. If he does not, but lies by, the other party or a third person may obtain it.

Practice of the Board of Property, for a short period, to order resurveys where more than ten percent. in addition to the quantity called for, was returned, commented on. *Dixon's Executors v. Christ.* 54

2. Where land for which a warrant has issued, has been sold for taxes, and the warrant holder makes no claim for twenty-one years, and does not pay nor offer to pay the taxes accruing during that time, it may be left to the jury to presume an ouster of him or abandonment by him.

Lapse of time strengthens a title founded on a sale for taxes.

Where a shifted warrant is surveyed, but the survey not returned nor efforts shown to have it returned, a resurvey made for an adverse claimant under a sale for taxes, accrues to his benefit and not to the benefit of the warrant holder. *Read v. Goodyear.* 350

LEGACY.

See DEVISE, 1.

1. Testator directed that his wife at his decease should have the amount of money remaining in the hands of his executors, to be put out at interest, or in such stock as his executors should think most productive, the whole income thereof to be paid annually to his wife, until T. P. should arrive at the age of twenty-one years; then the said T. P. to have one hundred and forty dollars, and his wife to have the income of the remainder during her natural life. T. P. died before twenty-one: held, that the legacy lapsed. *King v. Crawford.* 118

2. Bequest to testator's grandson, A. E., of a sum of money; "and if he should die without issue, then the part, as willed to him, is to fall to my heirs back, to be divided amongst my children, as in my will is mentioned, share and share alike." The bequest over is good, and A. E. cannot recover of the executors without securing the legatees over. *Eichelberger v. Barnitz.* 293

3. Interest is recoverable only from the time of demand or suit brought after eleven years by the widow against her son, for a legacy of an annual sum charged on land, equal to about one-third of the rent, there being no evidence of any agreement or of the conduct of the

children towards her. *Gaskins v. Gaskins.* 390

LIEN.

See *BANKS*, 2.

1. The lien of a judgment not revived, expires on the termination of the five years established by the limitation act of 1798, as against another judgment creditor, notwithstanding the death of the debtor before the end of the five years. *Fryhoffer v. Busby.* 121

LIMITATIONS.

1. What possession of a city lot is required under the statute of limitations. *Mackentile v. Savoy.* 104
2. After the dissolution of a partnership, one partner cannot, by his acknowledgment, revive a partnership debt, so as to deprive the other partner of the benefit of the act of limitations. *Levy v. Cadet.* 126
3. To constitute a mutual account within the exception in the statute of limitations, there must be reciprocal demands: it does not apply where the demand is altogether on one side, though payments on account have been made. *Ingram v. Sherard.* 347

MILITIA LAW.

1. Under the 28th section of the militia law of the 2d of April, 1822, if the proper officers of a company are not elected, or being elected, fail to perform their duty, without the fault of the brigade inspector or colonel of the regiment, the brigade inspector may appoint a person to make the enrolment and issue his warrant, to collect the sums payable by law. *Brooke v. Sharpless.* 148

MINOR.

1. A minor having an interest in land in common with adults, A. takes a deed from the latter,

and agrees to hold a part of the purchase money in his hands for the use of the minor, it being understood the minor might or might not take the money when he came of age, and A. enters into possession and enjoys the land, and sells part; four years after coming of age the minor tenders a deed and demands the money: *held*, that an action lies by the minor against A. on the promise.

The minor need not tender a deed containing a covenant of general warranty.

From what time interest shall be computed, in such case, is for the jury under the particular circumstances. *Uhland v. Uhland.* 265

MONEY PAID.

See *VENDOR AND VENDEE*.

MORTGAGE.

1. An absolute deed and defeasance, made at the same time, constitute a mortgage: and, if the defeasance is not recorded, it is to be considered as an unrecorded mortgage, and postponed to a judgment creditor of subsequent date, notwithstanding the absolute deed has been duly recorded. *Findley v. Hamilton.* 70
2. Where a mortgage is given to secure a debt, but the eight accompanying bonds are for instalments of the debt, payable at various periods, five of which bonds the holder assigned to different persons at different times, retaining three of the bonds himself, and the fund arising from the sale of the mortgaged premises, by execution against the mortgagor, falls short of the whole mortgage debt, the respective assignees and the mortgagee, are entitled to a *pro rata* dividend of the proceeds, according to the

amounts of their bonds by them held. *Donley v. Hays*. 400

3. On a mortgage given to secure the payment of a sum of money to three absent persons, in different proportions expressed in the mortgage, two of whom had then paid up the sum expressed, and the third had not, but did so by advances soon after the mortgage, if they proceed to a judgment and sale of the property by execution, and the proceeds are not sufficient to pay all, they are to be distributed according to the sums expressed in the mortgage. *Irwin v. Tabb*. 419

NOTICE.

See EJECTMENT. NUISANCE.

NUISANCE.

See ESTOPPEL.

1. A permission to another to erect a dam for a temporary purpose, is terminated by the decay of the dam, and will not authorize the erection of another dam in its place.

One who sees another erecting a dam, by which the water will be flowed back to his injury, is not bound to give him notice, if the latter is acquainted with his rights, or has the means of becoming so, and obstinately proceeds in the assertion of them.

Where notice is necessary, it is sufficient if the party employs efforts to give notice, and succeeds in doing so to the contractor for the defendant, though it does not appear the notice was actually conveyed to the defendant. *Hepburn v. M'Dowell*. 383

OFFICIAL BOND.

See SHERIFF'S BOND. CONSTABLE.

ORPHANS' COURT.

See DISTRIBUTIVE SHARE. APPEAL.

1. EXECUTORS AND ADMINISTRATORS.

PAROL EVIDENCE.

See DEEDS, 1.

PARTNERS.

1. During the continuance of a partnership, the ostensible partner carried on the business of the partners in the same name as that in which he transacted his private business, and in that name contracted a debt for money borrowed; but it did not appear whether the money was borrowed for the partnership, or his private use: *held*, that in the absence of evidence the presumption of law is, that the loan was made on the credit of the partnership business.

Of general and limited partnerships.

Though a co-partnership is by the articles to terminate at a certain period, it may be continued by express or tacit consent; and, in such case, the stipulations of the original articles would be considered as those of the continuing partnership.

Where two partners, one ostensible the other dormant, agreed, by private articles of co-partnership, to transact business in the name of the ostensible partner, *Nathan Smith*, but the business was carried on in the name of *N. Smith*: *held*, in an action against the partners, on a contract made in the name of *N. Smith*, that, to avail themselves of this objection, the defendants must plead it in abatement. *Mifflin v. Smith*. 165

2. In a suit against several partners, some of whom only are served, and appear and plead to issue, the plaintiff cannot compel one of the others not served nor appearing, to testify on his behalf.

The admission of one of the defendants sued as partner, that he and others composed the firm is evidence.

Though in a suit against several partners, some of whom have not appeared, the plaintiff declares against all, he may, after verdict against the rest, have judgment against the latter.
Taylor v. Filzsimmons. 453

PAYMENT WITH LEAVE.

1. In debt on a bond at the suit of an assignee, it is a good defence under the plea of payment, that the obligor before he knew of the assignment and before the bond became due, had become bound as security for the obligee in sums exceeding the amount of the bond, and had been obliged to pay them.
Frants v. Brown. 287
2. The jury may certify a sum due to the defendant where there is a plea of payment, though it does not appear there was any notice of special matter, or plea of set-off.
Calvin v. McChure. 385

PERSONAL ESTATE.

See REAL ESTATE.

PHILADELPHIA CITY.

See DELAWARE RIVER.

PHYSICIAN.

1. A physician is entitled to be paid out of the assets of a deceased insolvent, his claims for physic and attendance previous to the last illness of the deceased.
Rouse v. Morris. 328

PLEADING.

See DECLARATION. ESTOPPEL.

1. After going to trial on the merits, the court will not reverse the judgment because there is no plea nor issue, and blanks are left for dates and sums in the declaration.
Sauerman v. Weckerly. 116
2. After verdict, a declaration containing in substance the essentials of a cause of action is good.
Schlosser v. Brown. 250
3. After going to trial, and ver-

dict, it seems, it is too late to object in error, that a statement has been filed instead of a declaration.

A statement may be filed in a suit on a recognisance of bail in error.

The omission of the date of such recognisance in the statement, is cured by verdict.
Geary v. Cunningham. 424

PRESUMPTION.

See LANDS.

1. Where more than twenty years had elapsed from the time of payment stipulated in a single bill, and the obligor, when called on for payment, said, if he were allowed a credit on the bill for a sum which appeared credited on a book account, he would pay the balance: *held*, that the court were right in leaving it to the jury to say, whether this acknowledgment did not repel the presumption of payment arising from length of time.
McDowell v. McCullough. 51

POSSESSION.

See LIMITATIONS.

PRACTICE.

See CIRCUIT COURT. PARTNERS, 2.

PROTHONOTARY.

See FEES.

PROMISE.

See DECLARATION, 2.

QUARTER SESSIONS.

1. An action does not lie upon the sentence of the Court of Quarter Sessions on a conviction of fornication and bastardy, ordering a weekly allowance for the maintenance of the bastard child: the only means of enforcing the sentence is by a commitment in execution.
Eby v. Buskholder. 9

REAL ESTATE.

1. A copper kettle or boiler in a

brewhouse, is part of the freehold, and subject to the mechanics' lien law. *Gray v. Holdship*. 413

RECOGNISANCE.

1. The purchaser of property sold by order of the Orphans' Court, takes it divested of the lien of a recognisance given to secure the distributive shares. *Gilmore v. The Commonwealth*. 276
2. Recognisance on a docket, below the entry of the judgment; "S. F. of, &c., bound in the sum of three thousand and eight dollars and ninety-eight cents, conditioned for the payment of the debt, interest, and costs," signed by him and attested by the prothonotary's clerk, is a valid recognisance under the act allowing defendants to enter security for stay of execution. *Commonwealth v. Finney*. 282

RELEASE.

See EXECUTORS AND ADMINISTRATORS.

REPLEVIN.

1. When goods are levied on, and taken in execution, the court ought to quash a replevin issued for them.

When, however, this is not done, a party may avail himself of the statute by pleading in abatement, or bar such levy and taking in execution, and the cause of action on which the judgment and execution were obtained, cannot be inquired into in such case. *Shaw v. Levy*. 99

ROADS.

1. Viewers who lay out a road, if required by act of assembly to be freeholders, must be taken to have been so, unless the contrary appears.

It is a sufficient adjudication that the road is a public one, if the

viewers say they lay out the road for public use.

If the draft shows that the road passes through the lot of an individual, it need not state the precise distance it passes through it.

No notice need be given to the owners of land of the time when the viewers will meet to lay out a road passing through it, but the viewers ought, in passing through improved ground, to call the person living on the farm. *Road from App's Tavern*. 388

SALE FOR TAXES.

See LANDS.

SENTENCE.

See QUARTER SESSIONS.

STATEMENT.

See PLEADING.

SERVANTS.

1. The right of preference given to servants by act of assembly, out of the assets of a deceased debtor, is extinguished by their having taken from him single bills payable at a future day with interest. *Silver v. Williams*. 292

SHERIFF'S BOND.

1. The person who first sues on an official bond of a sheriff, is entitled to have his judgment first paid. *Christman v. The Commonwealth*. 381

SURETY.

See CONSTABLE.

TAXES.

See LANDS.

TIME.

See PRESUMPTION.

TRUSTEES.

See EXECUTORS AND ADMINISTRATORS.

UNITED STATES.

See APPEAL.

VENDOR AND VENDEE.

1. A counsel who has been consulted concerning the title of land about to be sold under an execution, and stated correctly that it was subject to liens, by which purchasers were deterred from bidding, is not thereby precluded from becoming a purchaser himself. *Dobbins v. Stevens.* 18
2. Where on a sale of real estate there is an agreement by the vendee that he will pay the mortgage money due on it, and afterwards the vendor is compelled to pay it in virtue of his personal liability, assumpsit for money paid lies against the vendee.
It seems, if such mortgage money forms part of the price of the land, it is just that the vendee should pay it.
But it must appear money was paid, to sustain a *narr.* in assumpsit for money paid: substitution of a mortgage for a judgment will not amount to such payment.
Counsel may be permitted to withdraw part of a claim in summing up to a jury. *Kearney v. Tanner.* 94
- 3: Where there is a sale of personal property, and possession suffered to remain in the vendor, as between the vendor and vendee, the property belongs to the latter; but if the vendor transfer and deliver it to a new purchaser, *bona fide*, and without notice, such new purchaser is entitled to hold against the original vendee. *Shaw v. Levy.* 99
4. The owner of a lot, forty-eight front, divides it into three lots, and erects buildings thereon:

after his death, his children, to whom they descended, make partition by deed, assigning two of the houses and lots to one child, and one house and lot to the other child, by metes and bounds; it having previously been ascertained, that the westernmost line of the original lot was laid two feet and a half on the ground of a third person: *it seems*, the owner of the westernmost house and lot, claiming under one of the children, must bear the loss, and cannot come on the owner of the adjoining lot to compensate it. *Mackentile v. Savoy.* 104

VERDICT.

See DOWER, 2. EJECTMENT, 1.

WARRANT AND SURVEY.

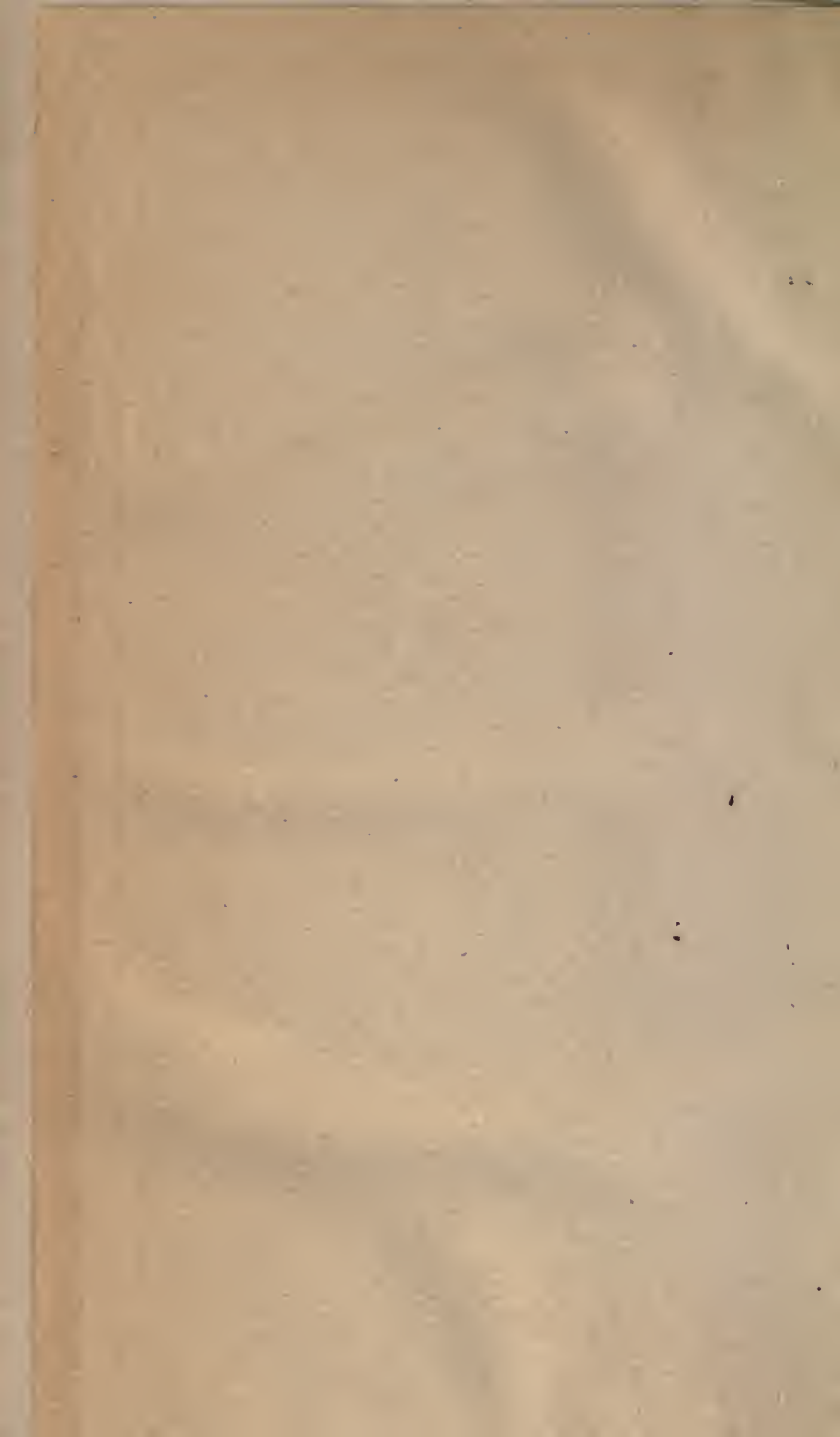
See LANDS.

WATER.

See ESTOPPEL. NUISANCE.

WITNESS.

1. In replevin by R., the defendant avowed the taking in a house occupied by N., for rent due by N. to the defendant: the plaintiff replied no rent in arrears. *Held*, that N. was not a witness for the plaintiff, being liable to the plaintiff for the costs of suit in addition to the amount of rent recovered. *Rush v. Flickwire.* 82
2. A party to a cause, sworn on his *voir dire* to his book of original entries cannot be examined generally by the opposite party, without his consent, but can only be examined to show it was not his book of original entries, or that the entries were not made at the time. *Shaw v. Levy.* 99



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